86-1809

No. 86-661

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

- - - - - - - -

LOUIS H. PEREGOFF

Petitioner

v.

THE CHESAPEAKE & POTOMAC
TELEPHONE COMPANY OF MARYLAND

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

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herein

160 pp

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS OF MARYLAND ERR IN DENYING PETITIONER'S WRIT OF CERTIORARI?

2. WAS THE ORDER OF THE COURT OF APPEALS OF MARYLAND AN ABUSE OF DISCRETION AND AN ERROR OF JUDGMENT WHEN IN THE INSTANT CASE THERE WERE SERIOUS AND NUMEROUS APPLICABLE ISSUES OF CONTRACTS AND CONSTITUTIONAL LAW AND FACTS PRESENTED BY THE PETITIONER OVER WHICH THE JUDICIAL TRIBUNALS OF MARYLAND HAD ORIGINAL AND/OR CONCURRENT JURISDICTION?

3. DID THE COURT OF APPEALS OF MARYLAND ERR IN DENYING THE PETITION FOR WRIT OF CERTIORARI WHERE THE FACTS SHOW THAT ONE OR MORE OF THE COUNTS IN THE COMPLAINTS HEREIN HAD JURISDICTIONAL STATUS?

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Opinions Below

The opinion of the Court of Appeals of Maryland is reprinted in Appendix A.

The opinion of Chief Judge Karwacki of the Court of Special Appeals of Maryland is reprinted in Appendix B.

Jurisdiction

The appellate decision affirming the Judgement of the Court of Special Appeals of Maryland and denying Petition for a Writ of Certiorari on the ground that "there has been no showing that review by Certiorari is desirable and in the public interest."

Such "Order" (Appendix A) was decided on January 2, 1987. This Petition for Certiorari was filed within 90 days of the date of that "Order" in compliance with 28 U.S.C.1257 (3) and the extension to May 2, 1987.

Inasmuch as petitioner is seeking review of the "Order" of the Court of Appeals of Maryland.

STATUTORY PROVISIONS

Article 78, Sec. 28, 28(a) of Annotated Code of Maryland

4th, 5th and 14th Amendments to the Constitution of the United States

Article 24 of the Maryland Declaration of Rights

STATEMENT OF THE CASE

The Petitioner (Complainant in the Circuit Court of Baltimore) filed a class action suit against the Defendant which had unlawfully and "automatically" enrolled Petitioner and "subscribers," without their prior consent, in an inside wire repair plan; unlawfully extorted security deposits from the Petitioner and "subscribers," without cash security for repayment thereof; unlawfully divested itself of its duty and obligation to provide Petitioner and "Subscribers" with telephone equipment, communications and information; unlawfully terminated telephone services without notice and opportunity for a hearing; unlawfully charged for services in advance.

Upon motion by the Defendant the Circuit Court dismissed Petitioner's complaint for lack of jurisdiction. Petitioner thereafter filed an appeal with the Court of Special Appeals which also dismissed Petitioner's

appeal. Petitioner thereafter filed a Petition for a Writ of Certiorari with the Court of Appeals of Maryland which denied the petition. "As there has been no showing that review by certiorari is desirable and in the public interest." This petition is thus filed herein.

REASON FOR GRANTING THE WRIT

The denial of the Petition for a Writ of Certiorari was an abuse of discretion and error by the Court of Appeals of Maryland.

In the instant situation there were serious and numerous material issues of facts and law which were controverted by Petitioner and which could only have been resolved by a trial.

1. DID THE COURT OF APPEALS OF MARYLAND ERR IN DENYING PETITION FOR A WRIT OF CERTIORARI?

The primary issue in this case is not if it is "desirable and in the public interest" to grant certiorari, but whether original or concurrent jurisdiction is vested herein with our judicial tribunals.

The adoption verbatim by the Court of Appeals of Maryland, as its own opinion, the barren and prejudicial words of the Defendant that it was "not desirable and in the public interest to grant certiorari herein is incomprehensible.

The predominant essence herein is not rates and their concommitant problems but rather contracts and constitutional law which are primarily matters for judicial determination.

The nondescript "public" referred to by the Court of Appeals of Maryland is not a viable or legally existent entity but which, however, the Court of Appeals of Maryland has used to deprive the two million resident customers and their families of their constitutional rights.

In answer to Petition for Writ of Certiorari, page six, the Defendant states: "Manifestly, it is not desirable and in the public interest that the court be burdened with a case which requires nothing more than the application of well-established principles..."

The hypocritical solicitude of the Defendant for the "public interest" and the burdensome travail of the Court of Appeals of Maryland in the execution of its judicial

functions is steeped in concern and very touching except for its usque ad nauseum source.

It is apparent that the repetitious chant of the Defendant that "It is not desirable and in the public interest" to grant the Petition for Writ of Certiorari is aimed at frustrating the review and investigation of the Defendant's "suspect" commercialism (see Judge Russell's exhaustive study in the raucous and untenable "Order" of the Maryland Court of Appeals constituted an abuse of discretion and a grave injustice to Petitioner and "subscribers." Petitioner respectfully submits that the cause of action herein merits the granting of the Petition for Writ of Certiorari.

COUNT ONE

1. ILLEGAL CHARGE AND COLLECTION FOR ALLEGED INSIDE WIRE REPAIRS.

On or about January 1, 1984 the Defendant by an "important notice" informed Petitioner and "subscribers" that they were being "automatically" enrolled in an inside wire telephone repair plan for fifty cents monthly, to be charged and collected immediately.

This plan was a devious ploy instituted by the Defendant without the prior consent of Petitioner and "subscribers" and was concocted by the Defendant and aided and abetted by the Public Service Commission of Maryland ("PSC") which authored the scheme.

The unsolicited "charge and collection" resulted in the Defendant defrauding Petitioner and "subscribers" to date, in the amount of thirty million dollars.

This deceptive ploy has spread like an epidemic through fifteen other states.

In choice two of its "important notice"

the Defendant stated (Appendix D, complaint): "If you want to take care of your own inside wiring, either by repairing it yourself or paying someone else to do it, fill out and return the enclosed post card. If you do this, we will stop billing you the 50 cents a month charge. And if we receive your post card before April 2, 1984, we will give you credit on your bill for the monthly charge back to January 1984.

No postcard? No refund of the questionable 2,400,000 dollars charged and collected by the Defendant from January 1, 1984 to April 1, 1984; and referring this cause of action to the "PSC," the author of the scheme, would be like tilting with windmills.

Petitioner and many thousands of "subscribers" have never accepted or benefited from the larcenous operation of the Defendant. The established principle that "silence is not acceptance" was ignored by the court. This unsolicited relationship

which was never accepted or affirmed by the Petitioner and "subscribers" under which the Defendant collected millions of dollars from them, was a wanton and ruthless disregard of Petitioner and "subscribers" rights under the due process and equal protection clauses of the Constitution of the United States.

Petitioner submits that this cause of action which clearly involves the validity of a contract is a judicial and not an administrative question.

SUPPLEMENT OF LAW AND FACTS

Porter v. General, 284 Md. 402

Silence can also operate as acceptance. Where "services are rendered under such circumstances that the party benefited thereby knows the terms on which they are being offered, [i]f he receives the benefit of the services in silence, when he had a reasonable opportunity to express his rejection of the offer, he is assenting to their terms proposed and thus accepts the offer"

Attorney v. McIntire, 282 Md. 93

Mrs. Poetzman cannot be charged with having accepted by silence the fee arrangement as indicated by the May 16, 1977 letter sent to her by Respondent. Generally, silence is not to be considered an acceptance of any offer. See 17 Am Jur 2d Contracts Sec. 47. And it will not be so considered unless the other party had a duty to accept or reply or if the parties had previously agreed that silence would be an acceptance.

Petitioner is not challenging the rate or its reasonableness. But is denouncing the corruptness of the charges and its contractual validity for which determination the courts have original jurisdiction.

COUNT TWO

2. SECURITY DEPOSITS WITHOUT CASH SECURITY FOR REPAYMENT OF CUSTOMERS' SECURITY DEPOSITS.

The termination of its services has always been arbitrary and capricious and without notice and opportunity for a hearing. "It has been consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interest." Wolff v. McDonnell, 413 U.S. 539.557-558 (1974).

"Some administrative procedure for entertaining customers' complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services." Memphis Light v. Craft, 436 U.S. 1.18.

Defendant, in its answer to Petitioner's Petition for Writ of Certiorari, states that security deposits are essential "to insure its financial integrity and lower rates."

That will be the day of the millenium. Petitioner respectfully submits, however, that the issue presented here is not whether security deposits are necessary, but rather whether security depositors should be protected with cash security for repayment of their deposits under the equal protection clause of the 14th Amendment to the Constitution of the United States.

As a matter of public records (at the offices of the Public Service Commission of Maryland) the Defendant has in its possession millions of dollars in security deposits for itself and the American Telephone and Telegraph Company (AT&T). These security deposits were the product of unlawful termination of services by the Defendant without notice and opportunity for a hearing and the extortion of the deposits as a condition precedent to restoration of services by Defendant and AT&T.

The failure of the Defendant to provide

cash security for repayment of security deposits has deprived security depositors of the equal protection of the 14th Amendment to the Constitution of the United States.

SUPPLEMENTAL LAW AND FACTS

Defendant suspended Petitioner's telephone service for belated payment of his telephone bill and that as a condition precedent to restoration of his services, the Petitioner, over the age of 60 years and exempt from security deposits, was compelled to post forty five ($45.00) cash with Defendant as security for payment of his future telephone service. This unlawfully coereced security deposit by the Defendant was without any date or promise of refunding, without any financial insurance or guarantee of repayment, and without any security for priority of repayment of the cash deposit over the Defendant's creditors and bond-holders. The lack of security for repayment of cash deposits affects adversely all of the Defendant's telephone customers.

The vulnerablity of banks, savings and loan associations and public utilities is a matter of public record. "Security deposits" without financial gurantee and monetary

safety of repayment deprives telephone customers of the constitutional protection of Article 24 of the Maryland Declaration of Rights and the 4th, 5th and 14th Amendments to the Constitution of the United States relating to due process and the equal protection of the law.

The $2.25 billion default of the Washington Public Power Supply System and the $4.5 billion bailout of the Continental Illinois Bank and Trust Company of Chicago and the many other defaulting banks, public utilities and savings and loan associations punctuate Black's equal protection laws:

"That equal protection and security shall be given to all under like circumstances in his life, liberty and his property and in the pursuit of happiness and in the exemption from any greater burden and charges than are equally imposed upon all others under like circumstances."

The validity and legality of "security deposits" are judicial and not administra-

tive questions which necessitate for determination the sagacity and legal knowledge of the judiciary tribunal; punctuate the urgency of financially guaranteeing repayment of cash security deposits.

COUNT THREE

3. UNLAWFUL DIVESTITURE OF EQUIPMENT, INFORMATION AND COMMUNICATION

On or about January 1, 1984, in derogation of its legal and contractual obligations and duties, Defendant unilaterally and unlawfully discontinued servicing its telephone customers with equipment, communications and information as mandated by Article 78 of the Annotated Code of Maryland to furnish instrumentalities, utilities, services and facilities which are safe, reasonable, just, adequate and efficient to all of its telephone customers (E-16 through E-19). Immediately thereafter, by some unprincipled and unsavory artifice, Defendant imposed a forty million dollar monthly tariff upon Petitioner and all of its telephone customers for the same "equipment communications and information" services from which it had divested itself and which has resulted in an unscrupulous financial boon to

it and the Defendant at the expense of customers.

Defendant has, since January 1, 1984, victimized Petitioner and "subscribers" and all of its other telephone customers in the approximate amount of six hundred million dollars.

The violations by the Defendant of its legal and contractual responsibilities has despoiled customers of their property and the constitutional protection of Article 24 of the Maryland Declaration of Rights and the 4th, 5th and 14th Amendments of the Constitution of the United States.

The illegal and ultra vires actions of the Defendant have been aggravated by the fact that the Defendant has been terminating the service of Petitioner and "subscribers" for failure to pay its charges promptly, terminations which have been wantonly and recklessly executed with total disregard for

the constitutional rights of the Defendant's 'subscribers".

There is nothing in its charter which gives Defendant the right to act as a collection agency for another public utility.

In the case of B.G. & E. et al vs. Heintz, et al, 760 F.2d 1408, Judge Russell paints an illuminating Dorian Gray portrait of "suspect" activities such as a no connection service to the AT&T for whom they have collected one billion dollars, more of less. That Defendant has been using public revenue for illegal and ultra vires activities is clearly apparent form the face of the record.

The illegal and ultra vires acts by the Chesapeake and Potomac Telephone Company, a wholly owned subsidiary of Bell Atlantic Corporation, are more than "suspect."

"The Public Service Commission is essentially a regulatory body. On the other hand, the validity or extent of charter

powers or franchise is a judicial question." Cambridge v. Eastern, 192 Md 333.

Petitioner respectfully submits that the Defendant should be required to refund 900 million dollars charged and collected from Petitioner and "subscribers" herein and that 200 million dollars in punitive damages be assessed.

Under the heading "Unlawful Discontinuance of Services and Rate Increases," the court stated, "Plaintiff's third count alleges that the Utility unlawfully discontinued equipment, communications and information services, Pincoffs, supra; Spintman, supra.

There are no "rates" or "services" involved herein but a denunciation of the illegal and ultra vires collection by the Defendant from Petitioner and "subscribers" for alleged equipment, information and communication services in the approximate amount of seven hundred million dollars.

By what a Procrustean distortion of its mind and rights the Defendant has presumed to act as a collection agency in illegal and ultra vires acts in violation of the provisions of its charter is shrounded in mystery.

The Defendant has the presumption to claim it has no connection with the party or parties for whom it has collected hundreds of millions of dollars, and that it does not know of what equipment, communication and information consist. FALSUS IN UNO, FALSUS IN OMNIBUS

The illegal and ultra vires actions of the Defendant is and has been aggravated by the fact that the Defendant has been terminating the service of Petitioner and subscribers for failure to pay the AT&T charges promptly, terminations which have been wantonly and ruthlessly executed with total disregard for the constitutional rights of the Petitioner and subscribers.

There is nothing in the Defendant's charter which gives it the right to act as a collection agency for another public utility.

Judge Russell, in the case of B.G. & E., et al vs. Heintz, et al, 760 F.2d 1408, paints a Dorian Gray portrait of utility suspect activities such as a service and no connection for whom they have collected one billion dollars, more or less, using public revenue is an illegal and ultra vires activity and for whom they have been terminating service of users who have failed to pay such unknown promptly.

Judge Russell refers to the case of Schwartz v. Roants, 595 F.2d 844, which prohibited a public utility from using public service revenues for non-operating expenses.

That the Defendant has been using public revenue for illegal and ultra vires activities is clearly apparent from the face of the record.

In the absence of legislative history construing the statute, the interpretation of the administrative agency charged with enforcing the statute, the meaning of which is at issue, is entitled to at least 'respectful consideration.' Schwartz v. Roants, 495 F.2d 844, 853 (2nd Cir. 1974) (interpreting N.Y. Pub. Serv. Law Section 107, McKinney's Consol. Laws c. 48, which prohibited a public utility from using public service revenues for non-operating expenses without the PSC's approval and reversing district court on basis of commission's opinion) (quoting Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 163 (1971)). See also Hart & Miller Islands v. Corps of Engineers, 621 F.2d 1281, 1290 (4th Cir. 1980) (following 'venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong')

(quoting Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969)). Despite the substantial deference accorded an agency's interpretation, the courts retain the final say on the construction of a statute; and if the construction posited by the agency is inconsistent..."

Judge Russell further continues:

"The potential for abuse of public services companies, which are only 'legal monopolies', are familiar and well documented. ...commentators recognize that holding companies provide the occasion for deceptive financial practices, non-disclosure of important corporate accounts and the manipulation of various 'service charge' by the holding companies which increase the utility's costs and the ultimate charge to the consumer and attempts to control suspect activity of holding companies and their subsidiaries activities."

"The Public Service Commission is essentially a regulatory body. On the other hand, the validity or extent of charter powers or franchise is a judicial question." Cambridge v. Eastern, 192 Md 333.

Black's Law Dictionary--"Ultra Vires--the modern technical designation, in the law of corporations, of acts beyond the scope of the powérs of a corporation, as defined by its charter or act of incorporation. State, ex rel v. Holston Trust Co., 168 Tenn. 546, 79 S.W.2d 1012, 1016. The term has a broad application and includes not only acts prohibited by the charter, but acts which are in excess of powers granted, and not prohibited. State, ex rel Supreme Temple of Pythian Sisters v. Cook, 234 Mo. App. 898, 136 S.W.2d 142, 146, and generally applied either when a corporation has no power whatever to do an act, or when the coporation has the power but exercises it irregularly. People, ex rel.

Barret v. Bank of Peoria, 295 Ill. App. 543, 15 N.E.2d 333, 335. Act is "ultra vires" when corporation is without authority to perform it under any circumstances or for any purpose. Orlando Orange Groves Co. v.Hale. 107 Fla. 304, 144 So. 674, 676. By doctrine of "ultra vires" a contract made by a corporation beyond the scope of its corporate powers is unlawful. Community Federal Sav. & Loan Ass'n. of Independence, Mo. v. Fields, C.C.A.Mo., 128 F.2d 705, 708. While the phrase "ultra vires" has been used to designate not only acts beyond the express and implied powers of a corporation but also acts contrary to public policy or contrary to some express statute prohibiting them, the latter class of acts is now termed illegal, and the "ultra vires" confined to the former class. In re Grant Union Co., C.C.A.N.Y., 219 F. 353, 363; Staacke v. Routledge, 111 Tex. 489, 241 S.W. 994, 998; Pennsylvania R. Co. v. Minis, 120 Md. 461, 496, 87 A. 1062, 1972.

SUPPLEMENT OF LAW AND FACTS

That the validity and legality of "security deposits" as practiced by the Defendant are judicial and not administrative questions which necessitate for determination the sagacity and legal knowledge of the judiciary tribunal.

The Court of Special Appeals claimed it has no connection with the party or parties for whom it has collected hundreds of millions of dollars, and that it does not know of what equipment, communication and information consists.

The illegal and ultra vires actions of the "CAP" have been aggravated by the fact that the "CAP" has been terminating the service of Petitioner and "subscribers" for failure to pay AT&T charges promptly, terminations which have been wantonly and recklessly executed with total disregard for the constitutional rights of the Petitioner and his class.

There is nothing in its charter which gives "CAP" the right to act as a collection agency for another public utility.

"CAP" entered into a conspiracy with AT&T under which it transferred its interest in the equipment, information and communications of which it had divested itself, and then began billing and collecting for AT&T services for the same equipment, information and communication.

In the "divestiture" case of United States v. American Telephone and Telegraph Company (AT&T), 552 F. Supp. 131, the following legend was mandated by the court:

Court: "If a seprated BOC provides billing services to AT&T, it shall include upon the portion of the bill devoted to interexchange services the following legend: 'This portion of your bill is provided as a service to AT&T. There is no connection between this company and AT&T.'

In this billing the "CAP" and AT&T combined to falsify it by stating that there is no connection between "CAP" and AT&T Information Systems, Inc., AT&T Communica-mmunications, Inc., and AT&T Equipment Company, wholly-owned subsidiaries of AT&T.

The falsification by the Defendant of its "no-connection" conspiracy with the AT&T (The American Telephone and Telegraph Company) has resulted to date in swindling the Petitioner and "subscribers" out of approximately one billion dollars.

COUNT FOUR

4. TERMINATION OF SERVICE WITHOUT HEARING AND OPPORTUNITY FOR A HEARING

The termination of services to Petitioner and subscribers were made by the Defendant on behalf of itself, the AT&T and its subsidiaries, without notice and opportunity for a hearing from any of the parties. Memphis Light v. Craft, 436 U.S. 1.18; Wolff v. McDonnell, 413 U.S. 557-558.

SUPPLEMENT OF LAW AND FACTS

The arbitrary, capricious and illegal suspension of Petitioner's service deprived him of his property and the constitutional protection of the due process clause of the Constitution of the United States, which at a minimum required that any deprivation of property be preceded by notice and opportunity for hearing.

All subscribers to Defendant's service in cases involving suspension of telephone service have been subjected to Defendant's

unlawful practices. In Mullane v. Central Hanover, 339 U.S. 306, Justice Jackson opined:

"Many controversies have raged about the cryptic and abstract words of the due process clause but there can be no doubt that at a minimum they require that the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

The Defendant has suspended, ultra vires and illegally, the telephone service of Petitioner and "subscribers" on behalf of the American Telephone and Telegraph Company. The Petitioner respectfully notes that neither he nor the "subscribers" have ever had any privity of contract with American Telephone and Telegraph Company or any other telephone utilities.

The Petitioner is attacking the constitutional validity of Defendant's

termination methods. The Public Service Commission lacks the authority or expertise to determine the proper or constitutional rights raised by Defendant, whose determinations are essentially judicial functions over which the Court has original jurisdiction.

COUNT FIVE

5. PAYMENT IN ADVANCE FOR SERVICE IN THE FUTURE

Petitioner submits that he is not challenging any rate, rule or regulation, but denounces the authorization with which the Commission has clothed the Defendant with the right to charge Plaintiff and subscribers in advance for services to be rendered in the future.

Various statutory provisions have been enacted in Maryland applicable to the intra-state services rendered by telephone companies. Thus, under Article 23 of the Code, telephone companies are required to render their services in the manner established by their properly adopted rules and regulations with impartiality and in good faith, and under Article 78 of the Code, public service companies are forbidden to give any undue or unreasonable preference to, or to discriminate against or cause any undue

or unreasonable prejudice to any person, locality or particular class of service.

A telephone company exercises a public employment and assumes the duty of serving the public while in that employment. It cannot refuse to perform its public services impartially, and a contract by a telephone company to discriminate as between users of its services is void.

A telephone company may, for just cause, suspend or discontinue its service to a subscriber as, for example, where he fails or refuses to pay bills for services rendered to him; however, a person who is erroneously refused telephone service has the right to maintain an action at law for damages and may be entitled to equitable relief in a proper case.

Petitioner submits that as a result he and subscribers are being deprived of their personal property and their constitutional rights under the 5th and 14th Amendments to

the Constitution of the United States, and that the Court has original jurisdiction to determine this count.

2. WAS THE ORDER OF THE COURT OF APPEALS OF MARYLAND AN ABUSE OF DISCRETION AND AN ERROR OF JUDGMENT WHEN IN THE INSTANT CASE THERE WERE SERIOUS AND NUMEROUS APPLICABLE ISSUES OF CONTRACTS AND CONSTITUTIONAL LAW AND FACTS PRESENTED BY THE PETITIONER OVER WHICH THE JUDICIAL TRIBUNALS OF MARYLAND HAD ORIGINAL AND/OR CONCURRENT JURISDICTION?

Primary and original and/or concurrent jurisdiction rests with the courts and judges of Maryland for determination of each and every count presented by Petitioner.

Each and every count presented herein by Petitioner revolves about property rights and constitutional law questions, all of which rest in judicial tribunals.

Petitioner respectfully submits that the jurisdictional status of Petitioner is fully supported by the facts related herein. Maryland National v. C. Washington Arena, 282 Md. 588. "In our opinion, the present issue is governed by the Doctrine of Primary Jurisdiction, which is a judicially created

rule designed to coordinate the allocation of functions between courts and administrative bodies. Where administrative remedies are not exclusive but merely cumulative to or concurrent with a judicial remedy, the rule that administrative remedies must be exhausted before resort is had to the courts does not come into play."

3. DID THE COURT OF APPEALS OF MARYLAND ERR IN DENYING THE PETITION FOR WRIT OF CERTIORARI WHERE THE FACTS SHOW THAT ONE OR MORE OF THE COUNTS IN THE COMPLAINT HEREIN HAD JURISDICTIONAL STATUS?

To the best of Petitioner's knowledge, information and belief, at no time has the Doctrine of Ancillary Jurisdiction been applied in Maryland. However, it has effectively and usefully been applied in the Federal Court: Friedenthal and Miller by "Civil Procedure"

In its formative years, ancillary jurisdiction was used principally to protect a Federal Court's jurisdiction over property against any interference by a state court.

Petitioner respectfully submits that if but one of the counts of his complaint, such as Count Two pertaining to security deposits may have jurisdictional status, that under the Doctrine of Ancillary Jurisdiction, this august tribunal may cognizance the case herein to determine its merits.

CONCLUSION

In essence, what the Court of Special Appeals has enacted, incomprehensively, is (1) it is not desirable and in the public interest to question the inside wire repair charge of 50 cents for each inside line (it is doubtful that any customer ever found it necessary to repair more than one line); (2) that it is not desirable and to the public interest to question "subscribers'" right to cash security for repayment of security deposits; (3) that "it is not desirable and in the public interest" to question the conspiratorial combination between the Defendant and the AT&T; (4) that it is not desirable and in the public interest for the two million telephone customers and their families to question the termination of their telephone service without any notice and opportunity for a hearing; and (5) that it is not desirable and in the public interest to question Defendant's right to payment in advance for future services.

The questions answer themselves and

Petitioner prays on behalf of himself and the millions of "subscribers" that this august tribunal grant herein the Petition for Writ of Certiorari, a petition which seeks review by the administrative justice of courts and judges.

Respectfully submitted,

Louis Peregoff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 1987, a copy of this Petition For A Writ of Certiorari was served on Semmes, Bowen & Semmes, Attorney for the Defendant, The Chesapeake & Potomac Telephone Company of Maryland.

Louis H. Peregoff

APPENDIXES

Louis Peregoff	*	IN THE
	*	COURT OF APPEALS
v.	*	OF MARYLAND
	*	Petition Docket
The Chesapeake and	*	No. 427
Potomac Telephone	*	September Term,
Company of Maryland	*	1986
	*	(No. 60,
	*	Court of Special
	*	Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
Chief Judge

Date: January 2, 1987

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 60

September Term, 1986

LOUIS PEREGOFF

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND

Garrity

Karwacki

Bell, Robert M.,

JJ.

PER CURIAM

Filed: September 17, 1986

The principal issue in this appeal is whether claims asserted by Louis Peregoff, the appellant, against the Chesapeake and Potomac Telephone Company of Maryland (C&P), the appellee, were maintainable in the Circuit Court for Baltimore City, or whether those claims were within the exclusive original jurisdiction of the Public Service Commission (P.S.C.). The issue was raised by the appellee's motion to dismiss pursuant to Rule 2-322. Judge Marshall A. Levin treated the motion as one for summary judgment under Rule 2-501 and granted judgment in favor of the appellee. Consequently, in reviewing this judgment we will recite the facts and all inferences fairly deducible therefrom, as disclosed by the pleadings, deposition, answers to interrogatories and exhibits before the hearing judge, in the light most favorable to the appellant. Baysinger et vir v. Schmid Products Company, ___Md.___(1986), No. 1, September Term, 1986, filed August 28, 1986; O'Hara v. Kovens, 305 Md. 280, 503 A.2d

1313 (1986); Greenberg v. State, 66 Md. App. 24, 502 A.2d 522 (1986).

On June 3, 1983, C&P applied to the P.S.C. for authority to increase and restructure its schedule of rates and charges for residential telephone service. Included within that application was C&P`s proposal to separate the charge for basic telephone service from a charge allocated to the cost of maintaining the telephone wires inside of the customer's residence. Theretofore, C&P had always provided that service to its customers in consideration of the basic telephone rate it charged. This proposal was approved by the Public Service Commission on December 30, 1983. This Inside Wire Maintenance Plan (the Plan) allowed C&P's customers to continue to receive inside wire maintenance from C&P for a monthly charge of 50 cents or to terminate that portion of C&P's service and bear the expense of maintaining the telephone wires within his or her premises. Customers choosing the latter

option could make their own repairs, hire an independent repairman or pay C&P to perform the necessary repairs.

In a supplementary order passed on January 6, 1984, the P.S.C ratified its approval of the Plan but required C&P to notify each customer that he or she had the option of electing or refusing the Plan until April 2, 1984. That order further provided: "Any customer who does not choose the option will receive credit for payments made from January 1, 1984 through April 1, 1984."

The general tariff of the P.S.C. regulating the costs and services of C&P which preexisted the P.S.C. orders of December 30, 1983 and January 6, 1984 and which remained in force thereafter provided:

> ...upon the acceptance of an application for service, all the applicable provisions in the Telephone Company's tariffs lawfully on file become the contract between the customer and Telephone Company. Requests for additional service and requests for changes in service shall be from the customer of the service, and upon acceptance thereof by the Telephone Company

> becomes part of the original contract, ...Any change in regulations or rates authorized by legally constituted authorities effects a modification of all contracts for service to that extent without further notice.

After the P.S.C. order of January 6, 1984, C&P mailed the following notice to all of its residential customers, including the appellant:

> IMPORTANT NOTICE TO ALL MARYLAND RESIDENCE CUSTOMERS ABOUT NEW OPTIONAL INSIDE WIRING MAINTENANCE PLAN
>
> In the past, C&P has always repaired the telephone wiring inside your home. The cost of this has always been included in the charge you are billed each month for your telephone service. Now C&P has an OPTIONAL INSIDE WIRING MAINTENANCE PLAN for Maryland residence customers, and you have two choices.
>
> CHOICE 1
> If you want C&P to continue repairing your inside telephone wiring, we will continue to bill you 50 cents a month. You are automatically enrolled in this PLAN. If you have a problem with your inside wiring just call C & P Repair Service and we will fix it.
>
> CHOICE 2
> If you want to take care of your own inside wiring, either by repairing it yourself or paying someone else to do it, fill out and return the enclosed post card. If you do this, we will stop billing you the 50 cents a month charge. And if we receive your post card before

> April 2, 1984, we will give you credit on your bill for the monthly charge back to January 1984. (C&P will still repair your wiring if you want us to, but you will be charged for the work performed.)

The appellant admitted that he received the notice.

On May 10, 1985, the appellant, a residential telephone customer of the C&P, filed a complaint in the circuit court on behalf of himself and all others similarly situated. He claimed that a number of the practices of the C&P were illegal, particularly assailing the implementation of its Inside Wire Maintenance Plan. The appellant sought "refunds, reparations and punitive damages" in the total amount of $1,980,000,000 and injunctive relief.[1]

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1 A class action challenging the C&P's Inside Wire Maintenance Plan had earlier been filed in the Circuit Court for Baltimore County. Podell v. the Chesapeake and Potomac Telephone Company, Case No. 84CSP--835. Proeedings in that case have been stayed pending our resolution of the case sub judice.

The C&P as a telephone company is subject to the "comprehensive and detailed machinery for the regulation of public utilities throughout the State" provided by the P.S.C Md. Code (1957, 1980 Repl. Vol.), Article 78, §1-107; Spintman v. C.& P. Tel. Co., 254 Md. 423, 427, 255 A.2d 304, 306 (1969). We commented on this wide reaching jurisdiction of the P.S.C over telephone companies in C&P Telephone Co. v. Pincoffs, 23 Md. App. 474, 478, 328 A.2d 78, 81 (1974):

> [T]he Commission is charged with the duty of supervising and regulating all public service companies subject to its jurisdiction, and of enforcing compliance by such companies with all the requirements of law, including requirements with respect to manner of operation, rates, and service. Code, Art. 78, §56. So it may fulfill this duty and its general duties and exercise its powers, the Legislature provided that proceedings be conducted before the Commission and designated the procedures to be followed. Code, Art. 78, §§ 76-88. The Commission is authorized to receive complaints from any person, § 77(a) or proceed on its own motion, § 77(c) and to conduct investigations, § 77(b) and hearings, §§ 79 and 82, serve process, § 78, issue subpoenas, § 80, and compel testimony on the production of evidence, § 81. In all hearings it shall prepare an offical record, which shall include testimony and exhibits, §83. The

> proceedings are governed by the rules of the Commission. It is not bound by the technical rules of evidence or procedure of courts of law or equity, §76. It shall take final action by order, §77(d), which in any contested action shall be in writing and state concisely the grounds for the Commission's conclusions, §85. There are provisions for judicial review at the circuit court level, §§89-97, and further review at the appellate level, §98.

The appellate courts of this state have consistently enforced the clear legislative design to commit all controverises arising between public utilities and their customers over manner of operation, rates and service of the utility to the P.S.C and have thwarted any attempt by customers to seek judicial redress without having first exhausted the admisistrative remedies provided by the legislature. Spintman v. C & P. Tel. Co., supra (challenge to reasonableness of rates); Stillman & Dolan v. C. & P. Tel. Co., 30 Md. App. 179, 351 A.2d 172 (1976) (attack on toll-free calling privileges within state); C&P Telephone Co. v. Pincoff, supra (attempt to invalidate tariff regulating use of customer provided telephone answering apparatus).

We view the appellant's complaints with regard to the C&P's Inside Wire Maintenance Plan approved by the P.S.C in the same vein. Any challenge to this feature of C&P's rate design and service must first be presented to the P.S.C for resolution. As explained in Stillman & Dolan v. C & P. Tel. Co., supra, quoting Gingell v. Board of County Commissioners, 249 Md. 374, 376-77, 239 A.2d 903, 905 (1968):

> The reasons for requiring the exhaustion of administrative remedies before resorting to the courts are that it is within the expertise of the administrative agency involved to hear and consider the evidence brought before it and make findings as to the propriety of the action requested; courts would be performing the function that the legislature specified be done by the administrative agency; courts might be called on to decide issues that would never arise if the prescribed administrative remedies were followed; and where a statute provides a specific form of remedy in a specific case then this remedy must be followed.

In addition to the appellant's claims related to the Inside Wire Maintenance Plan of C&P he also complains: that he was improperly required to post a security deposit for

telephone service; that C&P has discontinued certain equipment, communication and information services; and that C&P improperly has billed in advance for service. All of these claims concern the manner of operations, rates and service of C&P and original jurisdiction over them rests exclusively with the P.S.C. For the reasons articulated, the circuit court lacked jurisdiction to entertain the complaints until the appellant had exhausted his available administrative remedy. The assertion that these practices deny him constitutional rights does not affect the necessity that administrative remedies must be exhausted. Poe v. M&CC, 241 Md. 303, 216 A.2d 707 (1966); Harbor Island Marina, Inc. v. Bd. of Co. Comm'rs, 286 Md. 303, 308-09, 407 A.,2d 738, 741 (1979).

Finally, the appellant's attempt to state a cause of action for trespass, q.c.f. based upon C&P's discontinuance of telephone service to his home was properly dismissed below. The appellant conceded that there was

no physical intrusion upon his property. That is an esential element of that tort. Gore v. Jarrett, 192 Md. 513, 517, 64 A.2d 550 (1949).

JUDGMENT AFFIRMED;
COSTS TO BE PAID BY
THE APPELLANT.

CIRCUIT COURT
FOR
BALTIMORE CITY

December 16, 1985

Louis Peregoff, Esquire
10 South Calvert Street
Baltimore, Maryland 21202

Benjamin R. Goertemiller, Esquire
10 Light Street
Baltimore, Maryland 21202

re: Peregoff v. The C&P Telephone Co. of Md.
85130045/L34450

Dear Counsel (and PLaintiff):

This letter will constitute the Opinion of this Court with respect to Plaintiff's Motion for Reconsideration of, and Rehearing on, the Court's Rulings Herein.

TRESPASS QUARE CLAUSUM FREGIT

It is felt that the original ruling contained in the Opinion dated September 30, 1985 is correct. Therefore said ruling is affirmed.

CONSTITUTIONAL QUESTIONS

Plaintiff contends that the Utility's "automatic enrollment scheme" (Plaintiff's Motion at 14) violates the due process and equal protection clauses of the United States Constitution (Id. at 14 and 30); that the failure to provide cash security for the repayment of the security depositors does likewise (Id. at 16 and 17); that the action of the Utility constituted a "trespass"; and that the suspension of service was arbitrary,

capricious and illegal, in violation of the United States Constitution. Id. at 26, 27 and 28.

In order to trigger these constitutional provisions, there must first be "state action." Plaintiff attacks the activities and practices of the Utility but the Utility is not part of the state, and ordinarily its activities would not constitute state action. It is true that it is heavily regulated by the state but such regulation without more does not constitute state action. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974). It is only when a regulatory agency itself approves a Utility's practice as the result of agency initiative that the practice becomes state action. P.S.C. v. Pollack, 343, U.S. 451 (1952). It would seem that there is a fair argument that the Utility's activities and practices do constitute state action in this case inasmuch as the Utility itself contends that the collection of service fees monthly in advance, for example, was done pursuant to COMAR 20.45.04.01A(1)(a) and the General Regulations Tariff No. 201, Sec. 1. D. 3(b). This would seem to reflect the Public Service Commission's imprimatur of the Utility's activities in this respect.

However, there are other obstacles to the constitutional attack. First, some of the complaints seem to be moot, as witness the cash security contention. Plaintiff has recovered the security deposit and consequently any damage that might have ensued as the result of the lack of a cash security is no longer present. Moreover, there is no allegation that any class member has lost any security deposit.

More importantly, however, plaintiff does not challenge the regulations of the PSC. He only challenges the application of these regulations. In so doing, he must first resort to the PSC and not the courts.

Poe v. MCC, 241 Md. 303 (1966) [administrative remedies must first be exhausted]. In order to mount a constitutional challenge in a court, he must challenge the constitutionality of COMAR 20.30.22, which authorizes the Utility to pay 6% interest on security deposits--something he does not do in his Complaint.

Aside from procedural requirements, the matter of security deposits is inextricably intertwined with the Utility's management, operation, practices and financial structure. Security deposits limit the number of uncollectible bills which would otherwise have to be borne by the Utility and its customers. The matter of cash security deposits and interest are therefore matters which should be considered first by the PSC. It must be remembered that the courts will hear and determine these matters but only as the result of judicial review and not resort to the courts in the first instance.

Plaintiff concedes that "he is not challenging any rate, rule or regulation" (Id.) at 15 and 30) but rather he

> "denounces the authorization with which the Commission has clothed the defendant with the right to charge Plaintiff and "his class in advance" for services to be rendered in the future." (Id. at 30)

It is not enough to "denounce authorizations." To provide a determination of the validity vel non of a particular regulation, there must be a contention that such regulation itself is unconstitutional so that the opposite party (the Utility in this case) may have notice of such contention and more important, so that the regulatory agency itself will have a chance to respond.

It may well be that the PSC might reconsider its regulations in light of a constitutional attack. If it does not, there is still judicial review. It is not felt that agency experience and expertise should be scrapped merely because of charges that the agency

> "...knows as little about the aforementioned questions as it does about the difference between the Ptolemaic system of astrology and the Copernicus theory of Helio Centricity and besides the PSC is too busy writing amicus curiae briefs on behalf of the telephone company..." Id. at 18.

In sum, the Rulings contained in this Court's Opinion letter dated September 30, 1985 are affirmed. The instant contentions must be brought before the PSC first. Hence Plaintiff's Motion for Reconsideration of, and Rehearing on, the Court's Rulings Herein, is hereby denied on this date first above written and the Utility's Motion to Dismiss, is hereby granted also on the date first written above.

Very truly yours,

Marshall A. Levin, Judge

CIRCUIT COURT
FOR
BALTIMORE CITY

September 30, 1985

Louis Peregoff, Esquire
10 South Calvert Street
Baltimore, Maryland 21202

Benjamin R. Goertemiller, Esquire
10 Light Street
Baltimore, Maryland 21202

re: Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland (hereafter called "Utility") Case No. 85130045/L34450

Dear Counsel (and Plaintiff):

This letter will serve as the Opinion of this Court with respect to the Motion to Dismiss filed by the Utility.

TRESPASS QUARE CLAUSUM FREGIT

In order to prevail, plaintiff must allege and prove that the Utility invaded his actual (and exclusive) possession of real property without title, or authority. Nissan Mot. Corp. v. Md. Shipbuilding and Drydock Co., 544 F. Supp. 1104 (D. Md. 192 Md. 1982), aff'd 742 F.2d 1449 (CA4,1984); Gore v. Jarrett, 192 Md. 513 (1948). Plaintiff concedes that there was no physical intrusion at all. He equates the termination of his telephone service by the Utility with trespass QCF (see his Deposition--marked Exh. 1 herein at 6-11). Whatever the method or consequences of the Utility's action, it does not constitute trespass QCF. Hence the Motion to Dismiss as to this count is, on the 30th day of September 1985, granted.[17]

SECURITY DEPOSIT

Plaintiff's second count alleges that a security deposit was unlawfully exacted from him as a prerequisite to the resumption of his terminated service; that it was without adequate security or promise of return at a reasonable interest rate; and that the Utility preferentially exempts subscribers over sixty (60) years of age.[27]

These claims may not be adjudicated before a Court of Law. They must first be brought before the Public Service Commission (PSC). The PSC has passed Order No. 50889 (July 1, 1970) and Order No. 62792 (January 1, 1978). codified at COMAR 20.30.02, to regulate residential customer deposits. These Orders, and the tariff provisions in force currently and at the relevant time[37], authorize the use of security deposits as a prerequisite to the reestablishment of "service;" govern the amount of deposit required and the amount of interest paid thereon; establish exemptions for those over age sixty (60); and set conditions for refund and procedures for appeal to the PSC. It is clear that these regulations and tariffs fall within the PSC's power to regulate "rates" and "standards of safe, adequate, reasonable, and proper service," Md. Ann. Code, Art.78, ss 68 and 73. Not only do they serve as prerequisites to the furnishing of telphone service, but they insure the Utility's financial integrity, and lower rates for ratepayers in general, by limiting the number of uncollectible bills which would otherwise have to be born by the Utiltites and their customers. Plaintiff's complaint thus relates to an integral part of the Utility's management, operations, practices and financial structure, which the PSC was intended to regulate. Because the PSC is authorized to receive complaints regarding its regulations and the application thereof,

Md. Ann. Code, Art. 78 §§ 2(dd) and 77, Count II must be intitally adjudicated before the PSC.

INSIDE MAINTENANCE PLAN
THE "OPT-OUT" MARKETING PLAN

Plaintiff contends that the Utility's inside wire maintenance plan violates state and federal constitutional provisions because (1) the Plan was not contained in tariffs approved by the PSC; (2) it was instituted without prior consent; and (3) it preferentially exempts non-residential subscribers.

The "Plan" provides for separate fees for repair service to inside wiring but if a residential subscriber elects, he[4/] could pay a fifty cent fee per month and receive such wiring without a separate fee. The Utility[5/] sent its residential customers a notice that they had the choice of electing or refusing until April 2, 1984.[6/] If they refused, they would have to make payments themselves; if they did nothing, they would be charged the monthly fifty cent fee.

The Utility contends that the PSC has exclusive jurisdiction. It proffers a Pennsylvania trial court decision to support its conclusion. Ominsky v. Bell Telephone Company of Penna.[7/] Ominsky, however, does not throw sufficient light on the instant matter because:

1. It states that "...the issues have already been fully and fairly litigated and decided by the PSC..." whereas the same is not specifically true in the instant case.[7A/]

2. The powers of the Pennsyvania PSC are not set out in Ominsky.

3. The Plan supposedly violated the Pennsylvania Unfair Trade Practices and

Consumer Protection Law, whereas no such contention is made herein.

The Utility also cites a Delaware trial court decision, Lipstein v. Co.[8] But Lipstein is not fully persuasive either because the "negative" opt-out was specifically approved by Delaware's PSC and no appeal was taken.[8A] Moreover, the Delaware[9] statute gives the PSC exclusive original supervision and regulation over the rates of public utilities as compared to the earlier language which granted only "general supervision." Lipstein found these very signifiicant. (see Op. at 6)

The Utility argues that the recent decision of Hon. Frank E. Cicone[10] in Podell v. The Chesapeake and Potomac Telephone Company of Maryland, should not be followed. Podell holds that there is an exception to the "exhaustion of administrative remedies" rule, namely , that when an issue only incidentally concerns matters which the administrative agency was legislatively created to solve and does not in any meaningful way involve expertise of the agency, general jurisdiction of the Courts will be invoked, Podell refers to two cases, Md. Nat. Cap.Pk. and Pl. Comm. v. Washington Nat. Arena, 282 Md. 588 (1978) and P. G. Co., Md. v. Herschel Blumberg, 288 Md. 275 (1980), and reasons that the opt-out issue is purely a legal issue, one best resolved by a court. In other words, it is purely a contract issue according to Podell.

The Washington National Arena case involved alternate administrative tax appeal remedies, however, and not matters of assessment, valuation and classification,[11] which were felt to be primarily for the tax agency. Thus this case is not clear authority for the proposition that the opt-out issue may be decided by a court.

It involved a pure question of contract construction, i.e., the enforceability of a waiver provision of a contract, whereas the opt-out issue involves the implementation of a matter already substantially preempted by the PSC. The Utility's tariff on file with the PSC serves as a contract for services between the Utility and the Plaintiff.[12] Before January 1, 1984, the Utility provided inside wire repair as part of the Utility's monthly service---and this was done per an Order of the PSC.[13] On January 1, 1984, however, in accordance with the "Rate Design" part of Order 66504,[14] the Utility implemented its inside wire maintenance plan through tariff revisions. The PSC, however required the Utility to notify every residential customer of their choice of electing or refusing the Plan until April 2, 1984.

It is thus seen that the implemetation of the Plan and its notice component were ordered by the PSC. This is far different from the interpretation of a contract. It is also noteworthy that the Utility did not suddenly spring a brand-new plan upon the plaintiff, rather it adopted a mechanism for an already exisiting service plan. And it was done pursuant to order of the PSC, which inter alia, required that "requests for changes in service shall be from the customer...."[15]

Podell also cites the Blumberg case, but that case holds that administrative, not judicial, remedies, must be used, 288 Md. at 275, and hence is not persuasive.

The issues raised by the plaintiff should be first dealt with by the PSC and not the courts. They involve "practices"[16] affecting the nature of the Utility's "service" and hence fall within the original ratemaking jurisdiction of the PSC.[17] They partake more of matters involving

administrative, and not judicial, expertise. If one is aggrieved, there is resort to a court, with ultimate resort to an appellate court having statewide jurisdiction.

Resoulution of this issue will require, for example, a balancing of whether it is in the public interest to cut off maintenance service for everyone who fails to opt for it affirmatively, or to continue the service for everyone who fails to opt-out affimatively. Plaintiff has the right to file a complaint with the PSC[18] and thus secure a resolution of the issue he raises. Compare, C&P Tel. Co. v. Pincoffs, 23 Md. App. 474 (1974). The matter of who can better resolve the issue--or indeed who can at least as well resolve it--has already been foreclosed by the legislature which has determined that the administrative agency and not the courts must first tackle a problem such as this, see, e.g., Spintman[19] v. C&P Tel. Co., 254 Md. 423 (1969).

> Plaintiff asserts that the issues are: ...essentially judicial and not administrative questions and necessitate determination by the judiciary tribunal and not the administrative ineptitude of the PSC...Complaint at 3 and that ...the validity and the legality of "security deposits" as practiced by the defendant are judicial and not administrative questions which necessitate for determining the sagacity and legal knowledge of the judiciary tribunal..., Compl. at 5 & 6.

But the jurisdiction of this court is not ousted, rather it is postponed. Even if the PSC did not have exclusive jurisdiction as to certain matters complained of, it has, at least, primary jurisdiction. Substitution of judicial judgment is felt to be

inappropiate in the context of the questions presented by the Complaint. This is particularly true when injunctive relief is sought.

Considerations of administrative expertise must be considered. The opt-out concept may result in certain consequences in a bilateral contract between two private persons but altogether different consequences when involved in a public utility setting. The PSC should control the latter situation. While a court can determine complex court actions, it generally must do so with the help of special masters, court auditors and the like; whereas the PSC has an experienced staff and the background of historical regulation of the defendant. This court does not find that the plaintiff will be injured by pursuing his administrative remedy. And remember there is judicial review for either arbitrary administrative action, or a result unsupportd by substantial evidence.

Plaintiff charges the PSC with "ineptitude" and praises the court system for its "sagacity" but nowhere does he spell out any facts in support of such descriptions. A judicial finding of administrative futility is not warranted and has not been demonstrated by the Complaint.

UNLAWFUL DISCONTINUATION OF SERVICES AND RATE INCREASES

This court adopts the allegations of the defendant contained in page 13 of its Memorandum in Support of its Motion to Dismiss. Plaintiff's third count alleges that the Utility unlawfully discontinued equipment, communications and information services, yet imposed additional illegal charges. This also falls within the exclusive, original jurisdiction of the Commission to determine "rates" and standards of "service." The determination of "rates",

including the adjudication of complaints regarding same, must first occur at the Commisssion level. Art. 78 § 68, 2(q), 2(dd) and 77. See also, Pincoffs, supra; Spintman, supra. The same applies to the nature and extent of "service" provided by a utility. Art. 78, §§ 2(dd), 73 and 77. As the court recognized in Stillman v. C&P Tel. Co., 30 Md. App. 179, 189 (1976), where the plaintiff was aggrieved because it was not provided with toll free lines to Washington, D. C.:

> ...It is the clear legislative intent, apparent from the Public Service Commission Law, that this determination, in the first instance, be by the Commission and not by the courts. Such determination is within the expertise of the Commission, and it is the function of that agency to hear and consider evidence brought before it, and its duty to make findings on the propriety of the Telephone Company's actions....We can conceive that there may be valid reasons why demands for every type of service cannot always be met forthwith.

Since Count III fails to allege that Plaintiff exhausted his administrative remedy before the PSC, it too must be dismissed. The provision of services is a matter which, in the words of the Stillman court, "cries for expert evaluation." Id.

SUSPENSION OF SERVICE

Plaintiff contends (4th count) that the Utility unlawfully suspended his telephone service for nonpayment without proof of debt or judicial adjudication. It must first be noted that the plaintiff does not attack the regulations or orders of the PSC as being void or unconstitutional.

Here again this Court agrees with the allegations of the Utility contained in pages 14 and 15 of its aforesaid Memorandum.

It is clear that the PSC has original jurisdiction to adjudicate this complaint as well. Pursuant to Art. 78 §§64 and 73, authorizing the PSC to regulate "rates" and "service", Order No. 61496 (January 1, 1976), codified at COMAR, 20.45, was promulgated to "establish reasonable service standards." COMAR 20.45.02(B). The Order, and the Tariff (contract) provisions implementing it currently and at the relevant time, set out the circumstances and conditions under which services may be suspended for nonpayment of bills. Among other things, service may not be terminated pending investigation of disputed bills, reasonable collection efforts and five days written notice. See COMAR 20.45.04.01D; 20.45.04.06 and Exhibits 8a and b. This regulation is within the Commission's power since it obviously pertains to the furnishing of "service" and, indirectly, to the "rates" which must be charged to non-defaulting subscribers in general. Baltimore Gas and Electric Co. v. Everett, 61 Md. App. 288, 298 (1985), (PSC has authority to regulate utility termination of service practices under power to regulate services). This being the case, the PSC law, authorizing the PSC to entertain complaints regarding the implementation of it's regulations, clearly contemplates that claims such as this be brought before the Commission, Art. 78 §§2(dd) and 77, where that body's expertise can be brought to bear in determining whether the termination was in accord with its regulations and, if so, whether an exemption should be made.[20] Count IV must be dismissed without leave to amend.

PAYMENT FOR SERVICE IN ADVANCE

Here again the allegations of the defendant are adopted. This is also a matter

which falls within the Commission's exclusive purview. By Order No. 61496, the Commission has regulated customer billing, pursuant to its power to regulate "rates" and "reasonable service standards," Art. 78 §§64 and 73. in doing so, the Commission permits telephone company bills to include "local monthly services from the current to the next bill date." COMAR 20.45.04.01A(1)(a). This policy has been implemented in the tariff (contract) filed currently and at the relevant time.[21] Any complaints arising therefrom, must be made before the Commission, which has original jurisdiction. Count V must be dismissed without leave to amend.

APPROPRIATENESS OF PLAINTIFF AS REPRESENTATIVE OF THE "CLASS"

There is a serious question as to whether plaintiff has standing to represent the "class" of person whose telephone service has been suspended. He concedes that there was no physical intrusion into his residence. Since he has no viable trespass OCF action against the defendant, he would be a questionable representative of any class of persons into whose homes there was a physical intrusion.

Moreover, even if the plaintiff had standing and was "appropiate" to represent the class, it would appear that each class member must have a claim of $500 or more, since that is the jurisdictional amount in a jury case. Courts Art. 4-401 and 4-402(e). It does not appear that the claim for each class member would amount to $500. The Complaint seeks refunds for each residential telephone subscriber who has been charged fifty cents per month since January 1, 1984 for the Utility's inside wire maintenance plan. As of the date of the filing of suit, on or about May 9, 1985, this would amount to the sum of $8.50 per proposed class member. In addition, the $200,000,000 punitive damage

prayer falls short of making up the difference in the "amount of controversy." In its Answers to Plaintiff's Interrogatories, numbers one and three, the Utility furnished inside wire maintenance under the plan to 1,207,064 residential lines as of March, 1985. Each proposed class member would thus, at most be entitled to $165.69 in punitive damages, should plaintiff recover on their behalf. The total damages sought for each proposed class member, $174.69, is far from satisfying the jurisdictional amount necessary to vest this court with jurisdiction.

Nor does it seem that the claims of the class can be aggregated in order to meet the jurisdictional amount. Under the former class action rule (Md. R. 209), it was so held. Pollokoff v. Md. Nat. Bank., 288 Md. 485 (1980). The reasons in Pollokoff would seem to apply to the present class action rule (Md. R. 2-231). The present rule is derived from the Federal Rule of Civil Procedure 23, under which the federal courts have held that proposed class members may not aggregate their claims for the purpose of meeting the minimum jurisdictional amount. Zahn v. Co., 414 U.S. 291 (1973); Snyder v. Harris, 294 U.S. 332 (1969). Pollokoff relied upon Zahn and Snyder which leads this court to believe that there may not be aggregation under the present Maryland class action rule.

CONCLUSION

The Motion to Dismiss is hereby granted on the date first written above. It is not necessary, therefore, to reach the question of whether there are constitutional violations or whether there is state action. Plaintiff must avail himself of his statutory opportunity to bring his present complaints before the PSC. If there is adverse action by the PSC, he has the further statutory

right to judicial review. In fact, this court (and Plaintiff) was recently advised (Utility's letter dated September 12, 1985) that the PSC had, in effect, approved its "opt-out" procedure ("...the Company has not adequately demonstrated that it is in the public interest to modify Orders 66504 and 66508...") by its Order (67140) dated September 6, 1985. If plaintiff feels aggrieved thereby, he can avail himself of his statutory right to seek judicial review.

It is to be noted that the court has treated certain of defendants contentions as if they had been presented via the mechanism of a Motion for Summary Judgement. In view of the fact, however, that the plaintiff has requested the opportunity to present a memorandum (by his letter dated September 19, 1985) and since plaintiff has the additional right to respond to defendants pleading in the nature of a Motion for Summary Judgement (within 15 days from the date of the first above written Opinion), this court reserves the right to reconsider its ruling, if such course of action is found to be appropiate in the future.

Very truly yours,

Marshall A. Levin
Judge

FOOTNOTES

1/ At the oral argument on August 29, 1985, plaintiff agreed that the contents of his deposition could be considered in connection with the initial Motion to Dismiss. Md. Rule 2-322(b) states (in pertinent part) that "If, on a Motion to Dismiss for failure of the (Complaint) to state a claim upon which

relief can be granted, matters outside the pleading are presented to and not excluded by the court, the Motion shall be treated as one for Summary Judgment and disposed of as provided in Rule 2-501 and all parties shall be given reasonable opportunity to present all material made pertinent to such a Motion by Rule 2-501. Rule 2-501(b) allows a response to a Motion for Summary Judgment and Rule 2-311(b) requires that any response be filed within fifteen days after being served with the Motion. Plaintiff has not filed any response to the Utility's Motion, which latter Motion this court treats as a Motion for Summary Judgment. It would seem that he is either too late or else has acquiesced in a ruling that the trepass Quare Clausum Fregit count could be dismissed with prejudice. However, plaintiff has not heretofore been apprised of this court's ruling and hence he is granted fifteen days from the date first above written to file a response.

It is arguable that the Utility's action in terminating his telephone service interfered with the private use and enjoyment of his premises and if it resulted in a significant harm to such interest, that might involve liability on a nuisance theory.

Perhaps an analogy to "blasting" cases may be argued. Most jurisdictions apply a strict liability standard while some require a showing of negligence. Only a few states apply a nuisance theory, but Maryland is not one. 20 A.L.R. 2d 1372 (1951). It seems clear that Maryland will not permit recovery on a trespass or nuisance theory. Barroll v. United States, 135 F.Supp. 441, 447 (D. C. Md. 1955).

While it has been held that the projection of flouride compounds in the form of gasses and particulates, invisible to the human eye, onto the property of the plaintiff, was a trespass, Martin v. Co., 342 P.2d 790 (Or. 1959), that involves affirmative conduct of adding something to

the plaintiff's premises, whereas the instant case involves a taking away of power existing in the telephone lines.

2/ The allegation that exemptions for those over sixty (60) years of age constitues a preference is without merit. Art. 78, § 27 requires the PSC to mandate that telephone companies exempt subscribers over age sixty (60) from cash deposit requirements provided the subscriber does not owe any past-due bills. This is implemented in COMAR 20.30.02, which is binding on the Utility. Plaintiff does not allege that the statute is unconstitutional.

3/ Find same attached hereto, made a part hereof and referred to as Exhs. 2 and 3, respectively.

4/ "He" means "she" and vice versa.

5/ See plaintiff's Exh. 2 attached to his Complaint.

6/ Those rejecting the Plan would receive credit for payments between January 1, 1984 and April 1, 1984.

7/ 5214 (Pa. Common Pleas, July Term, 1984).

7A/ Since the writing of this Opinion, however, this Court has been apprised that Maryland's PSC has approved of the Utility's opt-out plan. See footnote 3, infra.

8/ Del. Ch. Aug 7, 1985.

8A/ See footnote 7A.

9/ 26 Del. C, § 201.

10/ Circuit Court for Baltimore County, issued June 18, 1985.

11/ Washington Nat. Arena, 282 Md. at 588.

12/ No. 201, Section 1. C. 1, since at least January 1, 1983, has provided:

> The Telephone Company reserves the right to require applications for service to be made in writing. Upon the acceptance of an application for service, all the applicable provisions in the Telephone Company's tariffs lawfully on file become the contract between the customer and Telephone Company. Requests for additional service and requests for changes in service shall be from the customer of the service and, upon acceptance thereof by the Telephone Company become a part of the original contract, except that each item of additional service so provided is subject to the appropiate initial contract period. Any change in regulations or rates authorized by legally constituted authorities effects a modification of all contracts for service to that extent, without further notice. (emphasis added.)

13/ PSC Order 66504, p. 125 (December 30, 1983)-see Utility's Exh. 2a of its Memorandum in Support of its Motion to Dismiss.

14/ As modified by Order 66508 (January 6, 1984 - see id. Exh. 2b.

15/ See General Regulations Tariff, PSC-Md. 201, 8 I.C.I.

16/ PSC law, Sec. 68 authorizes the PSC to "determine just and reasonable rates" and Sec. 2 (8) provides that "rates includes... tariffs...and any...practice affecting the ...nature and value of...services..." (emphasis supplied).

17/ Id. Sec. 56, "The Commission shall... enforce compliance...with...manner of operation, rates and service..."

18/ Id., Sec. 77.

19/ As in all facets of this decision, plaintiff is granted fifteen days from the date first above written to file a response. See footnote 1.

20/ Effective January 1, 1984 in accordance with PSC Order dated December 30, 1983, the Utility"...may, without incurring any liability, either suspend or terminate the service of...(b) non-payment of any sum due for service...and may continue such suspension... until all charges due are paid..." The same was true effective November 25, 1980 under General Regulations, PSC #201.

21/ Effective December 1, 1982 (and again effective January 1, 1984 in accordance with Order 66504 of the PSC dated December 30, 1983), General Regulation D.1. states that "1. Advance Payments. Applicants for service may be required to pay any service...charges ...in advance of the installation of service..."

COMPLAINT

The Plaintiff respectfully represents unto this Honorable Court that he is a resident and commercial customer of the Chesapeake and Potomac Telephone Company, a public utility, hereinafter referred to as "Teleco"; and is bringing this class action suit pro se against "Teleco" for himself and on behalf of all similarly situated customers of "Teleco" hereinafter referred to as "subscribers" and any and all other customers of "Teleco" to be taken as included in the term "subscribers."

COUNT ONE

THE ENROLLMENT SNARE: SILENCE IS NOT ACCEPTANCE

1. Plaintiff prays that this count be considered as incorporated in and as part of each and every count hereof.

2. That on or about January 1, 1984, the Defendant, by a "we can help" blurb consisting of an unintelligible potpourri of jabberwocky and gobbledygook, and an

"important notice" flyer, informed all residence customers that they were being "automatically enrolled" in an "inside wiring maintenance plan," hereinafter referred to as the "Scheme," for inside wiring repairs for the "paltry" monthly tariff of 50 cents--as the bait--which, beginning immediately would be "automatically" charged and collected by it. (Attached hereto and prayed to be taken as part hereof are the blurb and flyer marked Exhibits One and Two respectively.)

3. That as will be observed, the "important notice" contains a deadline ultimatum that if any residence customers failed to reply to it before April 2, 1984, such customers would "automatically" forfeit all previous charges back to January 1, 1984. To the best of Plaintiff's knowledge, information and belief, the ultimatum netted the Defendant a lucrative profit at the time of about six million dollars.

4. That the "scheme" was an unlawful and larcenous charge which was not in force

at the time or specified in tariffs filed with the Public Service Commission and which was imposed upon residence customers without their prior consent.

5. That Plaintiff, and to the best of his knowledge, information and belief, no residence customer ever accepted or used the "scheme" or in any way benefited therefrom.

6. That the residence customers had no agreement, duty or obligation to reply to the Defendant's presumptuous and fraudulent enrollment "scheme."

7. That enclosed with the "important notice" flyer was a deceptive postcard which if signed by the residence customer released the Defendant from repairing inside telephone wiring as it had always done in the past (see Exhibit Two) and in which the residence customer stated that "I understand that I will be responsible for maintaining the telephone wiring inside my home." (Attached hereto and prayed to be taken as part hereof is the postcard marked Exhibit Three.)

8. That the Defendant has violated the public utility laws by preferentially exempting all of their telephone customers except residence customers from paying for inside telephone wiring repairs.

9. That despite the fact as divulged by Defendant in its "important notice" flyer (see Exhibit Two) that "There is no way to tell, 'if ever,'residence customers might have telephone wiring problems," and that "today inside wiring problems account for only about eight (8) percent of all residence telephone service problems," the "Teleco" directors invented the "scheme" by which to date they have victimized residence customers in the approximate amount of thirty million dollars.

10. That the "inside wiring maintenance plan" of the Defendant was an unprincipled and facitious artifice which has deprived residence customers of their property and the constitutional protection of Article 24 of the Maryland Declaration of Rights and the

4th, 5th and 14th Amendments to the Constitution of the United States.

11. That the issues presented herein are essentially judicial and not administrative questions and necessitate determination by the judiciary tribunal and not the administrative ineptitude of the Public Service Commission.

WHEREFORE, Plaintiff prays:

(a) That the Defendant be ordered to refund to its residence customers all money collected from them and to deposit the entire amount with the Clerk of the Court for repayment to residence customers, in the amount of Thirty Million Dollars ($30,000,000.00).

(b) That an interlocutory injunction pendente lite be passed restraining Defendant from continuing its "inside wiring maintenance plan."

(c) That punitive damages be assessed against Defendant in the amount of two Hundred Million Dollars ($200,000,000.00).

(d) And for such other and further relief as the case may require.

COUNT TWO

SECURITY DEPOSITS: SAUCE FOR THE GOOSE IS SAUCE FOR THE GANDER

1. Plaintiff prays that this count be considered as incorporated in and as part of each and every count hereof.

2. That on or about December 6, 1982, "Teleco" suspended Plaintiff's telephone service for belated payment of his telephone bill of twenty-eight dollars ($28.00).

3. That after payment of the bill and as condition precedent to restoration of his services, Plaintiff, over the age of 60 years and exempt from security deposits, was compelled to post forty-five dollars ($45.00) cash with "Teleco" as security for payment of his future telephone service.

4. That this unlawfully coerced security deposit by the Defendant was without any date or promise of refunding, without any financial insurance or guarantee of repayment, without any provision as to a

reasonable rate of interest and without any security for priority of repayment of the cash deposit over the Defendant's creditors and bondholders.

5. That the same aforementioned lack of security for repayment of cash deposits affects adversely all of the Defendant's telephone customers.

6. That the Defendant has violated the mandates of the public utility laws by preferentially exempting from posting security deposits those dwelling units occupied by telephone customers over the age of 60 years and those physically incapacitated.

7. That Plaintiff's deposit was refunded after 15 months with $3.26 interest, a confiscatory rate in comparison with the 14% interest Defendant has been paying its bondholders. It is significant to note that holders of indentures and bonds of the Defendant have priority of repayment over

creditors and security depositors of the Defendant.

8. That the vulnerability of banks, savings and loan associations and public utilities is a matter of public record and "security deposits" without financial guarantee of repayment deprives telephone customers of their property and the constitutional protection of Article 24 of the Maryland Declaration of Rights and the 4th, 5th and 14th Amendments to the Constitution of the United States relating to due process and the equal protection of the law.

> "That equal protection and security shall be given to all under like circumstances in his life, liberty and his property and in the pursuit of happiness and in the exemption from any greater burden and charges than are equally imposed upon all others under like circumstances."

9. That the $2.25 billion default of the Washington Public Power Supply System and the $4.5 billion bailout of the Continental Illinois Bank and Trust Company of Chicago

and the many other defaulting banks, public utilities and savings and loan associations punctuate the urgency of financially guaranteeing the repayment of the security deposits of the millions of customers of "Teleco." (See Exhibit Four attached hereto and prayed to be taken as part hereof.)

10. That the validity and legality of "security deposits" as practiced by the Defendant are judicial and not administrative questions which necessitate for determination the sagacity and legal knowledge of the judiciary tribunal.

WHEREFORE, Plaintiff prays:

(a) That the Court pass an order requiring Defendant to file herein the names and addresses of its security depositors and the amounts deposited by them.

(b) That "Teleco" be ordered to deposit with the Clerk of the Court herein all of the security deposits it has of its customers. To be refunded to security depositors under the Court's supervision.

(c) That an interlocutory injunction pendente lite be passed restraining Defendant from demanding security deposits from its customers.

(d) That punitive damages of One Million Dollars ($1,000,000.00) be awarded Louis Peregoff.

(e) That Two Hundred Million Dollars ($200,000,000.00) in punitive damages be awarded Plaintiff and subscribers herein.

(f) Any and such other and further relief as the case may require.

COUNT THREE

PRIVITY OF CONTRACT: DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS

1. Plaintiff prays that this count be considered as incorporated in as part of each and every count hereof.

2. That on or about January 1, 1984, in derogation of its legal and contractual obligations and duties, "Teleco" unilaterally and unlawfully discontinued servicing its telephone customers with equipment, communications and information as mandated by

the Public Service Commission and Article 78 of the Annotated Code of Maryland to furnish instrumentalities, utilities, services and facilities which are safe, reasonable, just, adequate and efficient to all of its telephone customers.

3. That immediately thereafter, by some unprincipled and unsavory artifice, "Teleco" imposed a Forty Million Dollar ($40,000,000.00) monthly tariff upon Plaintiff and all of its telephone customers for the same "equipment communications and information" services from which it had divested itself and which has resulted in an unscrupulous financial boon to the Defendant at the expense of customers.

4. That the illegal antics of the Defendant were further aggravated when under the guise of separate lebels (1) an "inside wiring maintenance" ploy and (2) an "equipment communication and information" service, Defendant has since January 1, 1984, victimized Plaintiff and "subscribers" and

all of its other telephone customers in the approximate amount of Six Hundred Million Dollars ($600,000,000.00).

5. That the divestiture by the Defendant of its duty and obligations to provide Plaintiff and "subscribers" with inside wiring maintenance and equipment, communications and information services and to charge collect tariffs not in force at the time or on file in the schedules of the Public Service Commission was arbitrary, capricious and illegal.

6. That the Defendant has always provided any inside wiring repairs, equipment, communications and information services.

7. That there is no privity or contract existing between Plaintiff and other telephone customers and Defendant's validating or justifying any change or alteration in the mutual contractual rights and obligations of the parties hereto.

8. That the violations by the Defendant of its legal and contractual responsibilities have despoiled all of their property and the constitutional protection of Article 24 of the Maryland Declaration of Rights and the 4th. 5th and 14th Amendments of the Constitution of the United States.

WHEREFORE, Plaintiff prays:

(a) That the Defendant be ordered to deposit with the Clerk of the Court for and on behalf of Plaintiff and subscribers herein the amount of Six Hundred Million Dollars ($600,000,000.00) more or less that it has collected since January 1, 1984, for "inside wiring" repairs and "equipment, maintenance and information" services.

(b) That punitive damages be assessed against Defendant for Plaintiff and subscribers in the amount of Two Hundred Million Dollars ($200,000,000.00)

(c) That an interlocutory injunction pendente lite be passed restraining Defendant from charging and collecting from residence

customers for inside wiring repairs and from all of its customers for equipment, communications and information service.

(d) That an order be passed requiring Defendant to furnish residence customers with inside wiring repairs and all of its customers with equipment, communications and information services as before January 1, 1984.

(e) And for such other and further relief as the case may require.

COUNT FOUR

UNWARRANTABLE TURNOFF; TRESPASS QUARE CLAUSUM FREGIT

1. Plaintiff prays that this count be considered as incorporated in and as part of each and every count hereof.

2. That prior to December 6, 1982, Plaintiff entered into a contractual relationship with "Teleco" which company agreed to furnish Plaintiff with telecommunication services at rates on file in the schedules of the Public Service Commission.

3. That on December 6, 1982, the Defendant wantonly and unlawfully suspended Plaintiff's telephone service without any proof of debt or judicial adjudication.

4. That Plaintiff's right to be secure in his property and his quiet possession was destroyed when the Defendant trespassed quare clausum fregit upon Plaintiff's residence in order to sever the lines and wires connecting Plaintiff's telephone with "Teleco" outside telephone operators.

5. That the Defendant's arbitrary, capricious and illegal suspension of Plaintiff's service deprived him of his property and the constitutional protection of the due process clause of the Constitution of the United States, which at a minimum required that any deprivation of property be preceded by notice and opportunity for hearing.

6. That all subscribers to "Teleco" service in cases involving suspension of

telephone service have been subjected to Defendant's unlawful practices.

7. That Defendant's actions have subjected Plaintiff to a great deal of embarrassment and emotional trauma.

WHEREFORE, Plaintiff prays:

(a) That an order be passed restraining Defendant from suspending its telephone service without judicial decree.

(b) That punitive damages be awarded Plaintiff and subscribers herein in the amount of Two Hundred Million Dollars ($200,000,000.00).

(c) That an interlocutory injunction pendente lite be passed restraining Defendant from suspending telephone service withut judicial decree.

(d) And for such other and further relief as the case may require.

COUNT FIVE

HE THAT PAYS FOR WORK BEFORE ITS DONE HAS A PENNY WORTH FOR TWO PENCE

1. Plaintiff prays that this count be considered as incorporated in and as part of

each and every count hereof.

2. That at the time or since, the contractual relationship for telephone service was entered into between Plaintiff and Defendant, no agreement was made requiring Plaintiff to pay for service monthly in advance.

3. That since the inception of "Teleco" service, Plaintiff and all telephone customers have been billed in advance for telephone service. (See Exhibit Six attached hereto and prayed to be taken as part hereof.)

4. That the Defendant's charge in advance was arbitrary, capricious and illegal, and deprived Plaintiff and all other "subscribers" of their property and the constitutional protection of Article 24 of the Maryland Declaration of Rights and the 4th, 5th and 14th Amendments to the Constitution of the United states.

5. That the amount charged monthly in advance, to the best of Plaintiff's

knowledge, information and belief, is One Hundred Fifty Million Dollars ($150,000,000.).

WHEREFORE, Plaintiff prays:

(a) That the Defendant be ordered to post with the Clerk of the Court One Hundred Fifty Million Dollars ($150,000,000.00) to be refunded to Plaintiff and "subscribers."

(b) That an interlocutory injunction pendente lite be passed restraining Defendant from charging in advance for telephone service.

(c) That punitive damages be awarded Plaintiff and subscribers herein in the amount of Two Hundred Million Dollars ($200,000,000.00).

(d) And for such other and further relief as the case may require.

CONCLUSION

THEY WHO LIVE BY THE SWORD SHALL PERISH BY THE SWORD

LOUIS PEREGOFF respectfully submits to this Honorable Court:

1. That all of the facts and allegations set forth in each and every count

herein are true to the best of his knowledge, information and belief;

2. That the Plaintiff and the four million telephone customers of the Defendant have been despoiled of their property and the constitutional protection without due process and the equal protection of the laws are mandated by Article 24 of the Maryland Declaration of Rights and the 4th, 5th and 14th Amendments to the Constitution of the United States;

3. And that refunds, reparations and punitive damages in the amount of One Billion Nine Hundred Eighty Million ($1,980,000,000.00) be assessed against the Defendant and awarded to the Plaintiff and the millions of "subscribers" who have been the victims of "Teleco" directors' crass commercialism.

LOUIS PEREGOFF, et al	*	IN THE
Plaintiffs	*	CIRCUIT COURT
-v-	*	FOR
THE CHESAPEAKE AND	*	BALTIMORE CITY
POTOMAC TELEPHONE COMPANY	*	
Defendant	*	

****

INTERROGATORIES

Propounded pursuant to Maryland Rules

TO: The Chesapeake and Potomac Telephone Co. - Defendant

FROM: LOUIS PEREGOFF Plaintiff

You are requested to answer the following Interrogatories, which shall be continuing in character, so as to require you to file supplementary answers if you obtain further or different information before trial.

A. Where names are requested, please include both home and business addresses, if known.

B. Unless otherwise indicated, these Interrogatories refer to the time, place and

circumstances of the occurrence mentioned or complained of in the pleadings.

C. The pronoun "you" refers to the party to whom these Interrogatories are addressed.

1. State how many residence customers you have?

2. State how many other telephone customers you have?

3. State how many residence customers rejected your "inside wiring maintenance plan"?

4. State how many residences you made repairs to date hereof?

5. State when if ever your inside wiring maintenance plan was filed with the Public Service Commission?

6. State the total amount of your receipts from your inside wiring maintenance plan from January 1, 1984 to the date hereof?

7. State what your net profit was for the year 1984?

8. State what your total assets are?

9. State whom you exempt from security deposits other than residence customers over the age of 60 years?

10. State whether your security depositors have any priority of repayment over your general creditors or bond holders?

11. State what financial guarantee of repayment your security depositors have?

12. State the total amount of the security deposits you have on hand?

13. State what interest you have been paying security depositors?

14. State what interest you have been paying bond holders?

15. State by what right or authority you demand security deposits of your telephone customers?

16. State whether the Public Service Commission authorizes you to discontinue servicing telephone customers for equipment, communication and information?

17. State what your receipts have been since January 1, 1984 for such services?

18. State whether the tariffs you are charging for equipment, communications and information are on file with the schedules of the Public Service Commission?

LOUIS PEREGOFF, Pro Se
Plaintiff
10 South Calvert Street
Baltimore, Maryland 21202
539-0442

LOUIS PEREGOFF	*	IN THE
Plaintiff	*	CIRCUIT COURT
-v-	*	FOR
THE CHESAPEAKE AND	*	BALTIMORE CITY
POTOMAC TELEPHONE COMPANY	*	
Defendant	*	

****

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 2-501 of the Maryland Rules of Procedure, Plaintiff, moves this Court to enter summary judgment in Plaintiff's favor on the ground that there is no genuine dispute as to any material fact so that the plaintiff is entitled to judgment as a matter of law. The reasons for granting this motion are set forth in the attached affidavit.

LOUIS PEREGOFF, Pro Se
Plaintiff
10 South Calvert Street
Baltimore, Maryland 21201
539-0442

LOUIS PEREGOFF	*	IN THE
Plaintiff	*	CIRCUIT COURT
-v-	*	FOR
THE CHESAPEAKE AND	*	BALTIMORE CITY
POTOMAC TELEPHONE COMPANY	*	
OF MARYLAND	*	
Defendant	*	

****

AFFIDAVIT IN SUPPORT OF MOTION

FOR SUMMARY JUDGMENT

STATE OF MARYLAND, CITY OF BALTIMORE TO WIT:

I HEREBY CERTIFY, that on this 9th day of May, 1985, before me, the subscriber, a Notary Public of the State and City aforesaid, personally appeared Louis Peregoff and made oath in due form of law that the matters and facts set forth below are true.

1. That he has personal knowledge of the facts set forth herein.

2. That he is competent to be a witness and testify as to the facts set forth herein.

3. That he is a subscriber for telephone service.

4. That as a residence customer he was charged and is being charged with a monthly wiring maintenance fee which he did not consent to pay.

5. That the defendant has violated public utility laws by preferentially exempting all of their telephone customers except residence customers from paying for inside telephone wiring repairs.

6. That Plaintiff, over the age of 60 and exempt from security deposits was required to post a security deposit without any promise of or security for the refunding of his payment.

7. That the lack of guarantee for repayment of the required security deposit deprives customers of their property in violation of the 4th, 5th and 14th Amendments to the Constitution of the United States and in violation of Article 24 of the Maryland Declaration of Rights.

LOUIS PEREGOFF

As witness, my hand and Notorial on this 9th day of May, 1985.

_____
Notary Public

My Commssion Expires: 7/1/86

MOTION TO DISMISS

Defendant, The Chesapeake and Potomac Telephone Company of Maryland, by its attorneys, Benjamin R. Goertemiller and Semmes, Bowen & Semmes, moves to dismiss the Plaintiff's Complaint, and each and every Count thereof, pursuant to Rule 2-322 of the Maryland Rules of Procedure, on the grounds that this Court lacks jurisdiction over the subject matter of this action, that the Plaintiff lacks the capacity and standing to file this action in this Court, and that the Plaintiff has failed to state a claim upon which relief can be granted, and for reasons states:

1. That the Plaintiff alleges in Count I of his Complaint that the Defendant illegally instituted a fifty cent ($0.50) per month maintenance fee in accordance with its Inside Wiring Maintenance Plan for residential customers, including Plaintiff and other members of the class which he purports to represent; and that Defendant

illegally and preferentially exempted all non-residential customers from paying for inside telephone wire maintenance.

2. That the Plaintiff alleges in Count II of his Complaint that the Defendant unlawfully coerced the payment of a security deposit as a condition for restoration of telephone service suspended for the late payment of a bill; and that repayment of the security deposit was unlawfully and inadequately secured and without provision for repayment at a reasonable rate of interest. The aforementioned lack of security for repayment is alleged to adversely affect all of the Defendant's telephone customers. Plaintiff also alleges that Defendant illegally and preferentially exempted those telephone customers who are over sixty (60) years of age, or who are physically incapacitated, from posting security deposits.

3. That the Plaintiff alleges in Count III of his Complaint that the Defendant

unlawfully discontinued servicing its customers with equipment, communications and information; and that Defendant thereafter imposed an additional tariff and charges for inside wiring maintenance and equipment, communications and information services.

4. That the Plaintiff alleges in Count IV of his Complaint that the Defendant unlawfully suspended Plaintiff's telephone service without proof of debt or judicial adjudication. Count IV further alleges that all subscribers whose telephone service has been suspended have been subjected to this unlawful practice.

5. That the Plaintiff alleges in Count V of his Complaint that the Defendant unlawfully charges Plaintiff and all telephone customers for telephone service monthly in advance.

6. That the Defendant is a "public service company" as defined by the Maryland Public Service Commission Law, MD. ANN. CODE art. 78, §2(o) and (z) (1980 Repl. Vol.).

7. That the regulation of the services of the Defendant and the rates charged for such services, is vested exclusively in the Maryland Public Service Commission. MD. ANN. CODE art. 78, §§68 and 73 (1980 Repl. Vol.).

8. That the Public Service Commission law provides that complaints of the type alleged by the Plaintiff in Counts I through V of his Complaint shall be filed with the Public Service Commission and that the Commission has original jurisdiction to hear and to resolve such complaints by Order. MD. ANN. CODE art. 78,§§76-86 (1980 Repl. Vol.).

9. That this Court lacks original jurisdiction to hear such complaints as this Court's jurisdiction is limited to judicial review of decisions and orders of the Public Service Commission. MD. ANN. CODE art. 78, §§90-97 (1980 Repl. Vol.).

10. That Plaintiff's Complaint does not allege that he seeks judicial review of a decision or order of the Public Service Commission concerning the claim set forth

therein or that he has otherwise exhausted his administrative remedies before the Public Service Commission.

11. That Plaintiff, therefore, has failed to allege claims in Counts I through V of his Complaint within the subject matter jurisdiction of this Court and has demonstrated that he lacks standing to maintain this action in this Court.

12. That, in addition, the Plaintiff alleges in Count IV of his Complaint that the Defendant trespassed quare clausum fregit upon his "residence" in order to sever his telephone connection, destroying his quiet enjoyment and right to be secure in his property. Punitive damages alone, in the amount of Two Hundred Million ($200,000,000.00), are sought.

13. That Plaintiff's allegation of trespass contained in Count IV of his Complaint fails to state a claim upon which relief can be granted. Whether Defendant was lawfully on Plaintiff's premises to

disconnect service is an issue solely within the jurisdiction of the Public Service Commission. Moreover, Plaintiff has no basis in fact for his trespass claim, and merely states a legal conculsion. Count IV fails to set forth facts showing that Plaintiff was in actual and exclusive possession of the premises, fails to adequately identify Plaintiff's "residence," as required by MD. CTS. & JUD. PROC. CODE ANN., §10-909(a), does not allege that Defendant acted without lawful authority, and fails to describe how Defendant interfered with Plaintiff's possession of the premises.

14. That Plaintiff's claim for trespass is impermissibly contained in the same count with a distinct claim for unlawful suspension of telephone service, in violation of Rule 2-303(a), Maryland Rules of Procedure.

15. That Plaintiff's claim for trespass, which is absent allegations of evil motive or intent, does not state a claim for which punitive damages may be recovered.

WHEREFORE, the Defendant moves that the Court dismiss the Plaintiff's Complaint.

Benjamin R. Goertemiller

STATEMENT OF POINTS & AUTHORITIES

1. The Maryland Public Service Commission possesses exclusive jurisdiction to regulate the services and rates charged by telephone companies. MD. ANN. CODE, art. 78, §§1, 2(o), 2(z), 56, 68 and 73.

2. Complaint regarding violations of the law by public service companies shall be filed with the Public Service Commission, which has original jurisdiction. MD. ANN. CODE, art. 78, §§76-86 (1980 Repl. Vol.).

3. This Court's jurisdiction is limited to judicial review of decisions and orders of the Public Service Commission. MD. ANN. CODE, art. 78, §§90-97 (1980 Repl. Vol.).

4. When the Commission's hearing or complaint procedures may be utilized to redress a greivance, the Commission has exclusive jurisdiction over the Complaint.

Spintman v. Chesapeake and Potomac Telephone Company, 254 Md. 423, 255 A.2d 304 (1969); Stillman & Dolan, Inc. v. Chesapeake and Potomac Telephone Company, 30 Md. App. 177, 351 A.2d 172 (1976); Chesapeake and Potomac Telephone Company v. Pincoffs, 23 Md. App. 474, 328 A.2d 78 (1974).

5. To state a cause of action for trespass quare clausum fregit the following facts must be alleged: Plaintiff's actual and exculsive possession of the premises; Defendant's disturbance of that possession; the injuries sustained; Defendant acted without lawful authority; and a description sufficient to identify the premises. Gore v. Jarrett, 192 Md. 513, 516, 64 A.2d 550; Withers v. Ferrero Const. Co., 21 Md. App. 550, 556, 320 A.2d 576, cert. den. 272 Md. 751 (1974); Oasis Nightclub, Inc. v. Diebold, Inc., 261 F.Supp. 173, 174 (D.. Md. 1966).

6. Punitive damages for trespass quare clausum fregit are not recoverable without evil motive or intent. Associates Discount

Corp. v. Hillary, 262 Md. 570, 582, 278 A.2d 592 (1971).

7. The Defendant reserves the right to submit additional points and authorities in support of its Motion to Dismiss in any memoranda in support of, or at any hearing on, that Motion.

_____

Benjamin R. Goertemiller

LOUIS PEREGOFF	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
THE CHESAPEAKE	*	BALTIMORE CITY
AND POTOMAC	*	Case No.:
TELEPHONE COMPANY	*	85130045/L34450
OF MARYLAND	*	
Defendant	*	

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ANSWERS TO INTERROGATORIES

The Defendant, The Chesapeake and Potomac Telephone Company of Maryland, by its attorneys James P. Garland, Benjamin R. Goertemiller and Semmes, Bowen & Semmes, in answer to the Interrogatories propounded to it by plaintiff, says:

(a) The information supplied in these Answers to Interrogatories is not based solely on the knowledge of the executing party, his agents, employees, representatives, and attorney, unless privileged.

(b) The word usage and sentence structure is that of the attorney and does

not purport to be the exact language of the executing party.

Interrogatory No. 1: State how many residence customers you have?.

Answer: Defendant does not record the number of "customers." As of March, 1985, Defendant had 1,624,519 residence lines.

Interrogatory No. 2: State how many other telephone customers you have?

Answer: Defendant does not record the number of "customers." As of March, 1985, defendant had 393,079 business lines.

Interrogatory No. 3: State how many residence customers rejected your "inside wiring maintenance plan"?

Answer: As of March 31, 1985, 471,455 residence lines were not covered under the Plan.

Interrogatory No. 4: State how many residences you made repairs to date hereof.

Answer: Defendant objects to Interrogatory No. 4 on the grounds that it is vague and/or overly burdensome. Conceivably

this Interrogatory requires the defendant to research any and all repairs ever made at any residences at anytime. In the interest of amiable discovery, however, Defendant will endeavor to answer this Interrogatory for the period beginning January 1, 1984.

Interrogatory No. 5: State when if ever your inside wiring maintenance plan was filed with the Public Service Commission?

Answer: The Plan was filed with the Public Service Commission on June 3, 1983 and approved December 30, 1983. The tariff implementing the Plan became effective January 1, 1984.

Interrogatory No. 6: State the total amount of your receipts from your inside wiring maintenance plan from January 1, 1984 to the date hereof?

Answer: $10,121,500.00 through May, 1985.

Interrogatory No. 7: State what your net profit was for the year 1984?

Answer: $152,082,000.00.

Interrogatory No. 8: State what your total assets are?

Answer: $2,752,562,000.00

Interrogatory No. 9: State whom you exempt from security deposits other than residence customers over the age of 60 years?

Answer: Pursuant to COMAR 20.30.02.04(I) Defendant exempts from security deposit requirements those residential subscribing individuals who are 60 years old or older provided he or she presents satisfactory proof of age, is the primary user, and does not have a past due or uncollected bill owing. In addition, subscribers may establish credit by other methods set out in COMAR 20.30.02.02 and .03, if applicable.

Interrogatory No. 10: State whether your security depositors have any priority of repayment over your general creditors or bond holders?

Answer: Defendant objects to Interrogatory No. 10 on the ground that it

impermissibly calls for a legal conclusion.

Interrogatory No. 11: State what financial guarantee of repayment your security depositors have?

Answer: Defendant is required to refund security deposits under the circumstances listed at COMAR 20.30.02.05.

Interrogatory No. 12: State the total mount of the security deposits you have on hand?

Answer: $6,961,040.00 as of May 31, 1985.

Interrogatory No. 13: State what interest you have been paying security depositors?

Answer: 6% per annum, pursuant to COMAR 20.30.02.04(c).

Interrogatory No. 14: State what interest you have been paying your bond holders?

Answer: See the attached list of long-term debt as of March 1, 1985.

Interrogatory No. 15: State by what

right or authority you demand security deposits of your telephone customers?

Answer: Pursuant to COMAR 20.30.02 and General Regulations Tariff, P.S.C.-MD. No. 201(D)(2), 4th revised page 5, effective January 1, 1984, and predecessor provisions.

Interrogatory No. 16: State whether the Public Service Commission authorizes you to discontinue servicing telephone customers for equipment, communication and information?

Answer: Defendant objects to Interrogatory No. 16 on the grounds of vagueness. It is unclear what equipment, communication and information services plaintiff is referring to. General Regulations Tariff, P.S.C.-MD. No. 201(F)(3), 8th revised page 9, effective January 1, 1984 does, however, provide for the suspension or termination of certain services.

Interrogatory No. 17: State what your receipts have been since January 1, 1984 for such services?

Answer: Defendant objects to

Interrogatory No. 17 on the grounds of vagueness. It is unclear what "service" plaintiff is referring to.

Interrogatory No. 18: State whether the tariffs you are charging for equipment, communications and information are on file with the schedules of the Public Service Commission?

Answer: Defendant objects to Interrogatory No. 18 on the same grounds as stated in Answer No. 16. Charges made by Defendant are pursuant to tariffs on file with the Public Service Commission of Maryland, however.

James P. Garland

Benjamin R. Goertemiller

Semmes, Bowen & Semmes
10 Light Street
Baltimore, Maryland 21202
(301) 539-5040
Attorneys for Defendant

I solemnly affirm under the penalties of perjury that the contents of the foregoing Answers to Interrogatories are true to the best of my knowledge, information and belief.

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY

By_____
James E. Tracy
Staff Manager

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 1985, a copy of the foregoing Answers to Interrogatories was mailed, postage prepaid, to: Louis Peregoff, pro se, 10 South Calvert Street, Baltimore, MD 21202.

_____
Benjamin R. Goertemiller

PETITION FOR WRIT OF CERTIORARI

Louis Peregoff, Petitioner, hereby petitions the Court for a writ of certiorari to the Court of Special Appeals. Petitioner seeks a review of the judgment of September 17th, 1986 in the Court of Special Appeals in Louis Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, (No. 60, September Term, 1986) affirming the judgment of the Circuit Court for Baltimore City. A copy of the Opinion is attached as Exhibit A. The Court of Special Appeals issued its mandate on October 17th, 1986.

QUESTION PRESENTED

Did the Court of Special Appeals err in affirming the dismissal of this case by the lower court for lack of jurisdiction?

STATEMENT OF THE CASE AND FACTS

On or about January 6, 1984 the Respondent, in an "Important Notice" flyer, informed all resident customers that they were being automatically enrolled in an "Inside Wiring Maintenance Plan" for inside

wiring repairs for the monthly tariff of fifty cents which, beginning immediately, would be automatically charged and collected by it. The Inside Wiring Maintenance Plan unilaterally made customers parties to a new contract for services which had previously been covered as part of its basic rate. Thereafter, on May 10, 1985 the Petitioner, a residential customer of the Respondent, filed a class action suit in the Circuit Court for Baltimore City alleging that The Chesapeake and Potomac Telephone Company, illegally instituted an inside wiring maintenance fee, unlawfully coerced the payment of a security deposit without providing security for repayment, preferentially exempted specified customers from posting the security deposits, unlawfully discontinued services previously provided without charge, unlawfully suspended services without prior judicial adjudication, unlawfully charged for services in advance, unlawfully engaged in trespass quare clausum fregit and in other ways violated the

constitutional rights of subscribers. The Respondent filed a Motion to Dismiss for lack of subject matter jurisdiction in the Circuit Court. After a hearing on the Motion, the Circuit Court (Judge Marshall A. Levin) granted the Motion to Dismiss. The Petitioner filed a Motion for Reconsideration and Rehearing. The Court affirmed its ruling of September 30, 1985 dismissing the Complaint for lack of jurisdiction in the Circuit Court.

ARGUMENT

COUNT ONE

Nowhere in the orders of the Public Service Commission of Maryland (PSC) was there any authority permitting "C&P" to charge and collect under its "enrollment" scheme prior to the consent of Complainants.

Plaintiff is not challenging the rate or its reasonableness but is denouncing the corruptness of the charge and its contractual validity for which determination the Circuit Court has original jurisdiction.

The Defendant aggravated its unscrupulous commercialism by charging not alone for Plaintiff's and "subscribers'" main telephone but for each "line" extending to other residence rooms.

Plaintiff wishes to note respectfully for the Court's observation the falsification by the Defendant of its answer to Plaintiff's Interrogatory No. One, to wit: "State how many residence customers you have? Answer: Defendant does not record the number of customers." As of March, 1985, Defendant had 1,624,519 residence lines.

It is to be noted and a matter of public record and knowledge that they are residence lines which are charged a monthly fee of fifty cents each. Lines are not customers.

Customers' choice one under the Important Notice provides: "If you want C and P to continue repairing your inside telephone wiring, we will continue to bill you fifty cents a month. You are automatically enrolled in this plan." It is to be noted

that again the residence repair is "fifty cents a month," infra.

It is to be observed that nowhere in its "Important Notice" did the Defendant disclose to Plaintiff and "subscribers" that the lines extending from their telephone to other rooms in their residence will also be subject to a monthly charge.

Judge Karwacki, as well as Complainants, was lead up the garden path by the "C&P" deception cour:--The C and P customers will continue to receive inside repairs for a monthly charge of fifty cents--in the past C and P has always repaired inside wiring.--

Complainants respectfully submit that the inside wiring maintenance plan of the Defendant has deprived residence customers of their property and the constitutional protection of Art. 24 of the Maryland Declaration of Rights and the 5th and 14th Amendments to the Constitution of the United States.

COUNT TWO

That on or about December 2, 1982, "C&P" suspended Plaintiff's telephone service for belated payment of his telephone bill of twenty-eight dollars ($28.00).

That after payment of the bill and as condition precedent to restoration of his services, Plaintiff, over the age of 60 years and exempt from security deposits, was compelled to post forty-five dollars ($45.00) cash with "C&P" as security for payment of his future telephone service.

That the Defendant has violated the mandates of the public utility laws by preferentially exempting from posting security deposits those dwelling units occupied by telephone customers over the age of 60 years and those physically incapacitated.

That Plaintiff's deposit was refunded after 15 months with $3.26 interest, a confiscatory rate in comparison with the 14% interest Defendant has been paying its

bondholders. It is significant to note that holders of indentures and bonds of the Defendant have priority of repayment over creditors and security depositors of the Defendant.

> "That equal protection and security shall be given to all like circumstances in his life, liberty and his property and in the pursuit of happiness and in the exemption from any greater burden and charges than are equally imposed upon all others under like circumstances."

That the $2.25 billion default of the Washington Public Power Supply System and the $4.5 billion bailout of the Continental Illinois Bank and Trust Company of Chicago and the many other defaulting banks, public utilities and savings and loan associations punctuate the urgency of cash security for repayment of the security deposits of the millions of customers of "C&P".

That the validity and legality of "security deposits" as practiced by the Defendant are judicial and not administrative questions which necessitate for determination

the sagacity and legal knowledge of the judiciary tribunal.

COUNT THREE

The "C&P" has the impudence to claim it has no connection with the party or parties for whom it has collected hundreds of millions of dollars, and that it does not know of what equipment, communication and information consist.

The illegal and ultra vires actions of the "C&P" have been aggravated by the fact that the "C&P" has been terminating the service of complainants and his class for failure to pay "AT&T" charges promptly, terminations which have been wantonly and recklessly executed with total disregard for the constitutional rights of the complainants and his class.

There is nothing in its charter which gives "C&P" the right to act as a collection agency for another public utility.

Judge Russell, in the case of B.G. & E. et al vs. Heintz, et al, in the United States

Court of Appeals for the Fourth Circuit, case No. 84,1308, paints an illuminating "Dorian Gray Portrait" of utility suspect activities such as a no connection service to the AT&T for "which" it has collected one billion dollars, more or less. Therein, Judge Russell refers to the case of Schwartz v. Roants, 495 F.2d, 844, which prohibited a public utility from using public service revenues for non-operating expenses.

That the "C&P" has been using public revenue for illegal and ultra vires activities is clearly apparent from the face of the record.

Judge Russell further continues:

> "The potential for abuse of public service companies, which are only 'legal monopolies', are familiar and well documents. ...commentators recognize that holding companies provide the occasion for deceptive financial practices, non-disclosures of important corporate accounts and the manipulation of various 'service charge' by the holding companies which increase the utility's costs and the ultimate charge to the consumer and attempts to control suspect

> activity of holding companies and their subsidiaries activities."

The illegal and ultra vires acts by the Chesapeake and Potomac Telephone Company, a wholly owned subsidiary of Bell Atlantic Corporation, are more than suspect. Complainant respectfully submits such acts "require" not only compensation, reparations and punitive damages but total investigation by the proper authorities.

> "The Public Service Commission is essentially a regulatory body. On the other hand, the validity or extent of charter powers or franchise is a judicial question." Cambridge v. Eastern, 192 Md. 333.

> Black's Law Dictionary: "Ultra Vires -- The modern technical designation, in the law of corporations, of acts beyond the scope of the powers of a corporation, as defined by its charter or act of incorporation."

"While" the phrase "ultra vires" has been used to designate not only acts beyond the express and implied powers of a corporation but also acts contrary to public policy or contrary to some express statute

prohibiting them, the latter class of acts is now termed illegal, and the "ultra vires" confined to the former class. In re Grant Union Co., C.C.A.N.Y., 219 F. 353, 363; Staacke v. Routledge, 111 Tex 489, 241 S.W. 994, 998; Pennsylvania R. Co. v. Minis, 120 Md. 461, 496, 87 A.1062, 1072."

Complainant respectfully submits that the "C&P" should be required to refund 900 million dollars charged and collected from complainants and "subscribers" herein and that 200 million dollars in punitive damages be assessed.

On or about January 1, 1984, in derogation of its duties and obligations, with the covert approval and misfeasance and nonfeasance in office of the Public Service Commission of Maryland, "C&P" unilaterally and unlawfully discontinued providing its customers with telephone equipment, communications and information as mandated by Article 78, Secs. 27, 28 and 28A of the Annotated Code of Maryland to furnish

instruments, utilities, service and facilities which are safe, reasonable, just, adequate and efficient to all of its telephone customers.

Immediately thereafter, "C&P" entered into a conspiracy with "AT&T" under which it transferred its interest in the equipment, information and communications of which it had divested itself, and then began billing and collecting for "AT&T" services for the same equipment, information and communications.

In the "divestiture" case of United States v. American Telephone and Telegraph Company, 552 F. Suppl. 131, the following legend was mandated by the court:

> Court: "If a separated BOC provides billing services to AT&T, it shall include upon the portion of the bill devoted to interexchange services the following legend: 'This portion of your bill is provided as a service to "AT&T". There is no connection between this company and "AT&T".'

In this billing the "C&P" and "AT&T" Information Systems, Inc., AT&T Communications, Inc., and AT&T Equipment Company, wholly owned subsidiaries of "AT&T".

The falsification by the Defendant of its "no-connection" conspiracy with the AT&T (The American Telephone and Telegraph Company) which resulted to date, swindling the Plaintiff and "subscribers" out of approximately one billion dollars.

COUNT FOUR

On or about December 1, 1986, the Appellee suspended Appellant's telephone service for his alleged failure to pay promptly a twenty-eight dollar bill. Service was restored after Appellant posted a cash security of forty-five dollars.

The issue presented herein by Appellant for himself and subscribers is their constitutional right to quiet possession of their homes under Article 24 of the Maryland Declaration of Rights and/or the 5th and 14th Amendments to the Constitution of the United

States. Lack of physical presence does not automatically absolve a trespasser of guilt. Judge Levin based his dismissal of Count Three on the theory that Complainant had conceded that there was no physical presence of Appellee in his residence. While Complainant stated that there was no physical intrusion on his property, he did not concede that there was no trespass. Trespass may be committed in various ways, to wit: Wounding a resident by firing a pistol from outside; throwing a fire bomb from outside; invading a residence without a warrant to read a meter.

The sloughing off by the lower court and the Court of Special appeals of the ruling of His Honor Judge Cole in the case of Everett v. Baltimore Gas and Electric Company, that the BG&E must justify its service cuts in contested cases, is incredible. Complainant submits that the same principle of law adopted by His Honor Judge Cole should apply herein.

Judge Greenfeld's decision in the case of Maryland People's Counsel v. PSC in Case No. 85-130, now pending herein, fully supports Appellant's cause of action.

At a minimum due process required adjudication and notice and opportunity for a hearing. As pointed out by Mr. Justice Jackson in Mullane v. Central, 339 U.S. 3081:

> Many controversies have raged about cryptic abstract words of the due process clause. But there can be no doubt that at a minimum they require that the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Complainant respectfully submits that there are no questions of rates or service involved herein and that the lower courts erred in their decisions.

INCLINATION

On page 51 of the transcript of the hearing, here Judge Levin declared that he was inclined to grant Plaintiff's request for permission to amend his Complaint. Judge

Levin's change of heart foreclosed Plaintiff's opportunity to provide additional proof of the merits of his claim, thus depriving Plaintiff and "subscribers" further of their constitutional protection under Article 24 of the Maryland Declaration of Rights and the 5th and 14th Amendments to the Constitution of the United States. It was a grave abuse of discretion.

AMENDMENTS

CHAPTER X

All proceedings may be amended - when Amendments may be made.

184. Amendments now liberally allowed. These provisions are so clear as to call for but little comment. They indicate great liberality in the allowance of amendments, in order to prevent the substantial injustice of a cause from being defeated by formal slips or slight variances. And under operation, the practical injustice which formerly disfigured the administration of the law, in consequence of the enforcement of strict

technical rules of pleading, is greatly diminished.

The Circuit Court had original jurisdiction herein, as stated in Maryland National vs. Washington Arena, 282 Md. 558:

> In our opinion the present issue is is governed by the doctrine of primary jurisdiction which is a judicially created rule designed to coordinate the allocation of functions between courts and administrative bodies.

Where administrative remedies are not exculsive but merely cumulative or concurrent with a judicial remedy, the rule that administrative remedies must be exhausted before resort is had to the courts does not come into play.

COUNT FIVE

Complainant submits that he is not challenging any rate, rule or regulation, but denounces the authorization with which the Commission has alotted the Defendant with the right to charge Complainant and his class in advance for services to be rendered in the future.

Complainant submits that by being compelled to pay for service in advance that he and his class

are being deprived of their personal property a
their constitutional rights under the 5th and 14
Amendments to the Constitution of the United Stat
and that lower court had original and/or concurre
jurisdiction to determine this court.

CONCLUSION

The Court of Special Appeals erred
affirming the dismissal of the case by the low
court for lack of jurisdiction.

Louis Peregoff
10 S. Calvert Street
Baltimore, MD 21202
539-0442

Louis Peregoff	*	IN THE
Petitioner,	*	COURT OF APPEALS
v.	*	OF MARYLAND
The Chesapeake and	*	Petition Docket
Potomac Telephone	*	No. 427
Company of Maryland	*	September Term, 1986
Respondent	*	

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ANSWER TO PETITION FOR

WRIT OF CERTIORARI

The Chesapeake and Potomac Telephone Company of Maryland, Respondent, by James P. Garland, Benjamin R. Goertemiller, David A. Carter and Semmes, Bowen & Semmes, its attorneys, for answer to the Petition for Writ of Certiorari filed by Louis Peregoff seeking review of the decision of the Court of Special Appeals of Maryland in Louis Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 60, September Term, 1986, filed September 17, 1986, says:

1. The Petition fails to present with

accuracy, brevity and clarity the facts and issues essential to a ready and adequate understanding of the points requiring consideration, Maryland Rule 811(a)(4);

2. The Petition fails to establish that review by this Court is desirable and in the public interest for the following reasons:

a. The Petition fails to isolate any issues which are not capable of resolution by application of well-settled principles of Maryland law regarding exhaustion of administrative remedies;

b. The Petition fails to show that the application of well-settled legal principles in any way conflicts with prior pronouncements by either this Court or the Court of Special Appeals;

c. The issues proffered for the Court's review do not involve the constitutionality or construction of a statute, rule or regulation, questions of first impression, or questions requiring re-examination of settled law.

STATEMENT OF CASE

The Petitioner's class-action complaint alleges that some of the practices of The Chesapeake and Potomac Telephone Company of Maryland (hereafter "C&P"), particularly the implementation of its Inside Wire Maintenance Plan (hereafter the "Plan") do not comply with the law. The Public Service Commission (hereafter "PSC") approved the Plan by its orders of December 29, 1983 and January 6, 1984, which required C&P to separate the charges for maintenance and repair of the telephone wire inside customers' premises (inside wire maintenance) from the charge for basic telephone service. Petitioner did not appeal from the actions of the PSC, as provided by law, but instituted this independent action, purportedly on behalf of a class, seeking compensatory and punitive damages.

Historically, inside wire maintenance had been a part of C&P's basic telephone service and its cost was included in

calculating the basic telephone charge of all residential subscribers. The separation of charges was to permit individual customers to eliminate the maintenance service and its cost if they wished. The PSC's Orders authorizing the Plan established that the amount of fity-cents per month was attributable to inside wire maintenance and also required the continuation of that maintenance service.[1] Customers who wished to avoid the fifty-cent charge could

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1/ The PSC Orders required C&P to refund payments retroactively if a customer terminated the Plan by a specified date. C&P's PSC-approved tariff, which formed the "contract" between C&P and its customers, provided that "requests for changes in service shall be from the customer of the service", and that a PSC-approved change in "regulations or rates...effects a modification of all contracts for service to that extent without further notice." Since the Inside Wire Maintenance Plan was not a new service, but was simply the continuation of an existing service with an identifiable fee broken out from the basic telephone charge, C&P could discontinue that service only at the Customer's request. The establishment of the fifty cent fee for the Plan was a "change in regulations or rates" which effected a "modification" of Petitioner's contract for service "without further notice."

terminate the service and make their own arrangements for inside wire maintenance or repair. Petitioner contends that C&P should have terminated the inside wire maintenance service for everyone except those who might affirmatively apply to have it continued.

C&P's Motion to Dismiss, treated as a Motion for Summary Judgment, was granted by the Circuit Court (Levin, J). That decision was affirmed by the Court of Special Appeals on September 17, 1986 in a Per Curiam Opinion (Karwacki, J., Robert M. Bell, J. and Garrity, J.) on the grounds that Petitioner had not exhausted his administrative remedies and had failed to state a claim upon which relief can be granted.

The underlying issue in the case is whether Petitioner's challenge to C&P's implementation of an optional wire maintenance plan (as opposed to the previous practice of including wire maintenance costs in all customers' basic charges) must be presented to the PSC rather than in this

independent action. Both lower courts concluded that the initial challenge to the practice of C&P must be before the PSC.

ARGUMENT

Unfortunately, the Petition concentrates on the merits of Petitioner's case, while the sole issue in this proceeding is whether it is desirable and in the public interest for this Court to review the lower courts' rulings that Petitioner's complaints must first be presented to the PSC before being brought before the courts. This case does not involve the constitutionality or construction of a statute, rule or regulation; the re-examination of precedent in view of societal or political changes; a question of first impression; or an issue in which there are conflicting appellate decisions. Rather, the issues raised simply involve the clear-cut application of well-established rules requiring the exhaustion of remedies before the PSC. It would not, therefore, be desirable or in the

public interest for the Court to grant the Petition.

This Court and the Court of Special Appeals have long and consistently held that the PSC has exclusive, original jurisdiction when its statutory complaint procedures may be utilized to redress a utility customer's grievance. Spintman v. The Chesapeake and Potomac Telephone Company, 254 Md. 423, 255 A.2d 304 (1969); Stillman & Dolan, Inc. v. The Chesapeake and Potomac Telephone Company, 30 Md. App. 179, 351 A.2d 172 (1976); The Chesapeake and Potomac Telephone Company v. Pincoffs, 23 Md. App. 474, 328 A.2d 78 (1974). The provisions of the Public Service Commission Law vest the PSC with the power to entertain complaints from any person which allege violations of the Public Service Commission Law or of PSC orders and regulations. Md. Ann. Code, Article 78, §§77 and 2(dd). Such complaints can include allegations of: the demand or collection of illegal or unauthorized compensation in

violation of 27(a) or the failure to "[c]harge just and reasonable rates," or to "[f]urnish instrumentalities, utilities, services, and facilities which are safe, adequate, just, reasonable, economical, and efficient...", in violation of §28. "Rates", include not only "tariffs, fees, prices and any other charges...", but also any "regulation... or practice-...affecting the amount of such charges or the nature and value of the services...." §2(q). The PSC is empowered to conduct a hearing on the complaint, §§78-86, and to "dismiss the complaint or direct full or partial satisfaction therof, or direct such action as may be warranted thereon." §77(d).

It is clear from the Petition for Writ of Certiorari that all of the issues raised by Petitioner unquestionably fall within the PSC's statutory complaint procedures in accordance with well-established principles and thus do not require this Court's intervention for the purpose of establishing,

clarifying or reconciling conflict in Maryland law. Manifestly, it is not desirable and in the public interest that the Court be burdened with a case which requires nothing more than the application of well-established principles to complaints unquestionably falling within the jurisdiction of the PSC.

I.

Petitioner's initial argument is apparently that the Circuit Court had jurisdiction over Count One since C&P allegedly had no authority, without his affirmative consent, to charge fifty cents per month, per residence line[2], for the Inside Wiring Maintenance Plan. This is manifestly an issue vested initially in the PSC since the establishment and collection of a separately stated charge for inside wire maintenance is unquestionably a "regulation

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2/ Petitioner's assertion that C&P charged this fee for each telephone extension is incorrect. The fee was per line (exchange listing).

...or practice...affecting...the nature and value of [C&P's] services..." §2(q) (defining "rates"). The method of implementing the break-out of that charge favors preservation of, rather than inadvertent loss of, a service which customers were historically accustomed to receiving as an integral part of the provision of telephone service. Upon inadvertent loss of maintenance service, customers could incur substantial, unpredictable costs[3] to maintain operational telephone service. In cases where those costs were prohibitive, as with the aged or indigent, some customers could be totally deprived of telephone service if their inside wire should fail. Whether it is preferable to discontinue maintenance service for everyone who does not opt for the Plan

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3/ C&P's General Services Tariff, P.S.C.-Md.-No. 203, § 3(c)(1) provides for a work charge of $22.00 for the first 15 minutes and $12.00 for each additional 15 minutes, plus materials. Hence, in the absence of wire maintenance service, a repair taking one hour would cost a subscriber $58.00 plus materials.

affirmatively, or to continue the service for everyone who does not opt out affirmatively, thereby ensuring that customers are not inadvertently deprived of an important service, is precisely the type of issue which the Legislature vested with the PSC when it granted PSC the responsibility for supervising the regulating utilities "to assure [their] operation in the interest of the public..." § 56. It is initially up to the PSC to determine whether the "practice" by which the Plan was implemented was in accord with the Public Service Commission Law, PSC Orders and PSC-approved tariffs; whether the regulation or practice was "just and reasonable", §§2(q), 28(d) and 68(a), and whether the regulation or practice results in "safe, adequate, reasonable and proper service...", by C&P. §§28(c) and 73(a).

II.

Petitioner's argument with respect to Count Two, that the Courts have original jurisdiction to entertain his complaint that

C&P inadequately secured repayment of security deposits and preferentially exempted those over age 60 from tendering security deposits, also presents issues requiring nothing more than a literal application of Spintman and its progeny. First, the allegation of illegal preference is not only patently absured,[4] but clearly the proper subject for a complaint to the PSC. Article 78 § 26 specifies that illegal preferences are violations of the Public Service Commission law cognizable by the PSC. Similarly, the PSC has jurisdiction to regulate residential customer deposits pursuant to its authority to "promote adequate, economical and efficient delivery of utility services" and to prescribe "standards of safe, adequate, reasonable, and proper service...." §§ 56 and 73(a). Security deposits serve to insure a utility's

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4/ Art. 78, § 27A mandates that subscribers 60 years of age or over be exempt from security deposit requirements if they do not owe any past-due bills.

financial integrity, and lower rates for rate payers in general, by limiting the number of uncollectable bills. See COMAR 20.30.02.01. Petitioner's attack on the alleged lack of cash security for repayment of deposits relates to an integral part of C&P's management, operations, practices and financial structure, matters which the PSC is empowered initially to adjudicate and regulate.

III.

Petitioner's third argument is apparently that the Circuit Court had jurisdiction to consider the charge that C&P illegally discontinued providing certain telephone services and illegally collected for those services on behalf of American Telephone and Telegraph Company, which now provides them pursuant to the divestiture order entered in United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd 460 U.S. 1001 (1983). It is unquestionably within the exclusive

original jurisdiction of the PSC to hear complaints alleging that C&P demanded or collected an unauthorized charge or compensation, §§27(a), 77(a), or that it has failed to "furnish...-services, and facilities which are safe, adequate, just, reasonable, economical, and efficient,..." §§28(c) and 77(a).

IV.

Count Four, alleging the unlawful termination of Petitioner's telephone service, also requires nothing more than an application of the Spintman case. Since C&P's practices relating to termination of service obviously pertain to the furnishing of "service" and, indirectly, to the "rates" which must be charged to non-defaulting subscribers, Baltimore Gas & Electric Company v. Everett, 61 Md. App. 288, 486 A.2d 248 (1985), rev'd on other grds., 307 Md. 286, 513 A.2d 882 (1986), the PSC obviously has the power to regulate, and hence adjudicate, this complaint.

Petitioner also argues that the Court should review the trial court's failure to grant him leave to amend his Complaint as to Count Four. This would have been a needless exercise since Petitioner did not seek redress before the PSC. He also admitted that he could not state a claim for trespass quare clausum fregit (improperly joined in Count Four) by conceding that there was no physical intrusion onto his property, which is clearly an essential element of such trepass under Maryland law. Gore v. Jarrett, 192 Md. 513, 517, 64 A.2d 550 (1949).

V.

Petitioner's final argument is that his complaint regarding billing in advance for service was within the Circuit Court's original jurisdiction. This "practice" clearly falls within the PSC's exclusive, original jurisdiction to consider complaints regarding the legality of compensation, the justness and reasonableness of rates, and the propriety of "practices" affecting such charges. §§27(a), 28, and 68(a).

CONCLUSION

The Petition for Writ of Certiorari must be denied. The Petition fails to present with accuracy, brevity and clarity the issues and facts essential to a ready and adequate understanding of the points requiring consideration. In addition, the Petition fails to establish that review by this Court is desirable and in the public interest. The decision of the Court of Special Appeals is based entirely on the clear-cut application of well-settled legal principles defining the jurisdiction of the PSC. The Petition fails to show that the application of those principles in any way conflicted with prior pronouncements by either this Court or the Court of Special Appeals, or otherwise presented questions of sufficient importance to merit consideration by this Court.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 1986, a copy of the foregoing Answer to Petition for Writ of Certiorari was mailed, postage prepaid, to Louis Peregoff, Esquire, 10 S. Calvert Street, Baltimore, Maryland 21202.

David A. Carter

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 86-1809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOUIS H. PEREGOFF,
Petitioner

v.

THE CHESAPEAKE & POTOMAC
TELEPHONE COMPANY OF MARYLAND,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER A DISCRETIONARY REFUSAL BY THE HIGHEST APPELLATE COURT OF MARYLAND, TO REVIEW A DECISION OF MARYLAND'S INTERMEDIATE APPELLATE COURT, SHOULD BE REVIEWED BY THIS COURT ON CERTIORARI.

2. WHETHER A DECISION OF A STATE COURT, RESTING EXCLUSIVELY ON ADEQUATE AND INDEPENDENT STATE JURISDICTIONAL AND PROCEDURAL GROUNDS, SHOULD BE REVIEWED ON CERTIORARI.

LIST OF PARTIES

LOUIS H. PEREGOFF, *Petitioner*

The Chesapeake and Potomac Telephone Company of Maryland, *Respondent.* Respondent is a subsidiary of Bell Atlantic Corporation. Respondent has the following affiliates which have outstanding securities in the hands of the public: Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, New Jersey Bell Telephone Company, Bell Atlantic Systems Leasing International, Inc., and Bell Atlantic Tricon Leasing Corporation.

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Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 60, September Term, 1986 (Md. Ct. Spec. App., Sept. 17, 1986).

Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 85130045/L34450 (Cir. Ct. Balto. Cty., Dec. 16, 1985) (on reconsideration).

Peregoff v. The Chesapeake and Potomac Telephone Company of Maryland, No. 85130045/L34450 (Cir. Ct. Balto. Cty., Sept. 30, 1985).

JURISDICTION

Jurisdiction invoked by Petitioner pursuant to 28 U.S.C. § 1257(3) does not lie in this Court, as more fully explained below under Reasons for Denying the Writ.

STATUTES INVOLVED

28 U.S.C. § 1257(3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Md. Cts. & Jud. Proc. Code Ann., § 1-301 (1984 Repl. Vol.)

> The Court of Appeals of Maryland, established by Article IV, §§ 1 and 14 of the Constitution, is the highest court of the State.

Md. Cts. & Jud. Proc. Code Ann., § 1-401 (1984 Repl. Vol.)

> The Court of Special Appeals is established. It is an intermediate court of appeal authorized by Article IV, §§ 1 and 14A of the Constitution.

Md. Cts. & Jud. Proc. Code Ann., § 12-201 (1984 Repl. Vol.)

> Except as provided in § 12-202 of this title, in any case or proceeding pending in or decided by the Court of Special Appeals upon appeal from a circuit court or an orphans' court or the Maryland Tax Court, any party, including the State, may file in the Court of Appeals a petition for certiorari to review the case or proceeding. The petition may be filed either before or after the Court of Special Appeals has rendered a decision, but not later than the time prescribed by Maryland Rules. In a case or proceeding described in this section, the Court of Appeals also may issue the writ of certiorari on its own motion.

Md. Cts. & Jud. Proc. Code Ann., § 12-203 (1984 Repl. Vol.)

> If the Court of Appeals finds that the review of the case described in § 12-201 is desirable and in the public interest, the Court of Appeals shall require by writ of certiorari that the case be certified to it for review and determination. The writ may issue before or after the Court of Special Appeals has rendered a decision. The Court of Appeals may by rule provide for the number of its judges who must concur to grant the writ of certiorari in any case, but that number may not exceed three. Reasons for the denial of the writ shall be in writing.

No. 86-1809

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THE CHESAPEAKE & POTOMAC
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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, The Chesapeake and Potomac Telephone Company of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Order of the Court of Appeals of Maryland denying a writ of certiorari. That Order is found at Appendix A of the Petition.

STATEMENT OF THE CASE

The Petitioner, Louis Peregoff, filed a five count Complaint in the Circuit Court for Baltimore City on May 10, 1985, on behalf of himself and all others similarly situated, against Respondent, The Chesapeake and Potomac Telephone Company of Maryland (hereafter "C&P"). Petitioner charged that a number of C&P practices were illegal, particularly the

implementation of its Inside Wire Maintenance Plan (hereafter "Plan").[1] The Plan had been approved in Orders of the Public Service Commission of Maryland (hereafter "PSC"), dated December 29, 1983 and January 6, 1984. Those Orders also allowed C&P to separate the cost of maintaining telephone wire inside customers' premises from the charge for basic telephone service. In essence, the Plan would *continue* C&P's maintenance of inside wire for a fifty-cent per month fee, per telephone line, if the customer desired. Otherwise, the customer could terminate the maintenance service and make his or her own repairs, hire an independent repair service, or hire C&P on a time and materials basis. Basically, Petitioner's complaint was that C&P continued to charge customers who did not ask it to *discontinue* the service despite a PSC-ordered notification campaign which contemplated and required this procedure.

On June 13, 1985, C&P filed a Motion to Dismiss for failure to exhaust administrative remedies before the PSC and for failure to state a claim upon which relief can be granted.[2] The Circuit Court granted C&P's Motion to Dismiss, treating it as a Motion for Summary Judgment. That decision was affirmed on September 17, 1986 by the Court of Special Appeals of Maryland in a *Per Curiam* Opinion. The Court of Appeals of Maryland denied a Petition for Writ of Certiorari on January 2, 1987.

The Petition to this Court was filed on or about May 1, 1987, which was within the 45 day extension of time granted for filing it. In essence, the Petition argues that a writ of certiorari should issue for two reasons. First, the Court of Appeals should

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[1] In addition to his claims related to the Plan, Petitioner charged: that he was improperly required to post a security deposit for telephone service; that C&P improperly discontinued offering certain services; that, despite non-payment, his telephone service was improperly terminated; and that C&P improperly bills monthly in advance for service.

[2] That portion of the Motion seeking dismissal for failure to state a claim upon which relief can be granted was directed toward an allegation that C&P committed a trespass *quare clausum fregit* by terminating Petitioner's telephone service. As the Court of Special Appeals noted in its Opinion at 7 (A-11 and A-12), Petitioner conceded there was no physical intrusion, an essential element of that tort under Maryland law.

have granted a Petition for Writ of Certiorari even though the Court of Special Appeals had decided that the trial court's decision was in conformity with governing Maryland precedent. Second, it argues, at Pages 6, 11-12, 17-18, 24, 29 and 36-38, that the courts below erred in not holding that all of the issues involved should properly be decided by the Courts in the first instance even though, under unchallenged Maryland law, Petitioner's various complaints must initially be presented to the PSC.

REASONS FOR DENYING THE WRIT

1. THE COURT SHOULD DENY THE PETITION TO REVIEW THE COURT OF APPEALS' DISCRETIONARY DECISION NOT TO REVIEW THE COURT OF SPECIAL APPEALS' MANDATE.

All three questions presented by Petitioner ask the Court to decide whether the Court of Appeals of Maryland, Maryland's highest court, Md. Cts. & Jud. Proc. Code Ann., § 1-301 (1984 Repl. Vol.), erred or abused its discretion in denying a writ of certiorari to review a decision by the Court of Special Appeals, Maryland's intermediate appellate court, Md. Cts. & Jud. Proc. Code Ann., § 1-401 (1984 Repl. Vol.). The Court of Special Appeals had previously affirmed the Order of the Circuit Court for Baltimore City entering judgment in favor of respondent. It is clear that the Court of Appeals' Order denying a writ of certiorari, pursuant to its statutory discretion, Md. Cts. & Jud. Proc. Code Ann., §§ 12-201 and 12-203 (1984 Repl. Vol.), is not a final judgment reviewable pursuant to 28 U.S.C. § 1257(3).

Review by this Court of judgments of state courts is governed by 28 U.S.C. § 1257, which provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

It is well established that the Maryland Court of Appeals' decision denying a writ of certiorari is not an appealable final judgment within the meaning of this statute. Instead, if the highest court of a State declines to exercise its authority to review the judgment of an intermediate appellate court, the intermediate court's judgment, not the order declining review, is the reviewable final judgment "rendered by the highest court of a State in which a decision could be had. . . ." *Sullivan v. Texas,* 207 U.S. 416 (1908); *American Ry. Exp. Co. v. Levee,* 263 U.S. 19, 20-21 (1923); *Hammerstein v. Superior Court,* 341 U.S. 491, 492 (1951); *Michigan-Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 160 (1954); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676, 678 n. 1 (1968).

In *Michigan-Wisconsin Pipe Line Co.,* for example, the Court dismissed two appeals from the Supreme Court of Texas which were taken after that Court had refused applications for writs of error to the Court of Civil Appeals, an intermediate court. Holding, under 28 U.S.C., § 1257, that the appeals were properly from the Court of Civil Appeals, the Court quoted Mr. Justice Holmes' Opinion in *American Ry. Exp. Co.,* 263 U.S. at 20-21 as follows in pertinent part:

> * * * [U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary * * * and although it was necessary for the petitioner to invoke that jurisdiction in order to make

> it certain that the case could go no farther, * * * when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had.

As in the cited cases, the jurisdiction of the Court of Appeals of Maryland is discretionary. *See e.g. Walston v. Sun Cab Co.*, 267 Md. 559, 298 A.2d 391 (1973). Once that Court exercised its discretion by refusing to review this case on the ground that it was not "desirable and in the public interest", the judgment of the Court of Special Appeals became the final judgment "rendered by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257. Consequently, the Court of Appeals' Order denying Petitioner a writ of certiorari is not reviewable in this Court. The Petition should be denied since it only seeks review of that Order.

2. THE COURT SHOULD NOT REVIEW A MANDATE RESTING EXCLUSIVELY ON ADEQUATE AND INDEPENDENT STATE JURISDICTIONAL AND PROCEDURAL GROUNDS.

Even assuming that the Petition seeks review of the Court of Special Appeals' mandate, it is clear that the Court also lacks jurisdiction because the Court of Special Appeals' decision is based on adequate and independent state grounds. As this Court noted in *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of State courts that rest on adequate and independent State grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be

> rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Here there can be no doubt that the Court of Special Appeals' Mandate is based entirely on State grounds.

The Opinion upon which the Court of Special Appeals' Mandate was based is attached to the Petition at Appendix pages A-2 through A-12. It is apparent, from a review of the Opinion, that the basis for the court's decision was that, under Maryland law, Petitioner's claims fell within the exclusive original jurisdiction of the PSC. Maryland law required that Petitioner exhaust the remedies available to him before the PSC before seeking redress in the courts. Quoting from a line of Maryland cases defining the jurisdiction of the PSC, the court noted at page 5 (Appendix, A-9):

> The appellate courts of this state have consistently enforced the clear legislative design to commit all controversies arising between public utilities and their customers over manner of operation, rates and service of the utility to the P.S.C. and have thwarted any attempt by customers to seek judicial redress without having first exhausted the administrative remedies provided by the legislature.

Contrary to what Petitioner implies, the court did not deprive him of redress—it simply held that his redress, under the Public Service Commission Law of Maryland, stood with the PSC, a body authorized to receive complaints, serve process, conduct hearings, and enforce its decisions. Only after this was accomplished could he turn, under Maryland law, to the courts for judicial review. In the course of so holding, the court did not once quote, cite or refer to Federal law. The decision was unquestionably and exclusively based on unchallenged Maryland case law interpreting the Public Service Commission Law of Maryland, a fact which Petitioner does not appear to dispute. Hence, the resulting mandate is not reviewable in this Court since it is supported by adequate and independent state grounds.

CONCLUSION

At most, the Petitioner seeks nothing more than review of a Maryland court's mandate interpreting and effectuating Maryland law. Since the decision below is based entirely on unchallenged State law requiring the exhaustion of administrative remedies, the Court is respectfully requested to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: June 1, 1987.